No. 96-8334-CSY
Status: DECIDED
CAPITAL CASE

Title: Patrick DeWayne Bethley, Petitioner
v.
Louisiana

Docketed:
March 24, 1997

Court: Supreme Court of Louisiana

Counsel for petitioner: Holdridge,John

Counsel for respondent: Ieyoub,Richard P.

Entry	Date	Note	Proceedings and Orders
1	Mar 24 1997	D	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due April 23, 1997)
3	Apr 23 1997		Brief of respondent Louisiana in opposition filed.
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8	Jun 2 1997		Petition DENIED. Opinion respecting the denial of certiorari by Justice Stevens with whom Justice Ginsburg and Justice Breyer join. (Detached opinion.)

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

No. 96-8334

Supreme Court, U.S.
FILED
MAR 24 1997
OFFICE OF THE CLERK

PATRICK DEWAYNE BETHLEY,
Petitioner,

V.

STATE OF LOUISIANA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF LOUISIANA

THIS IS A DEATH PENALTY CASE

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96-8334
Bethley
v.
Louisiana

QUESTION PRESENTED

Does death as a penalty for statutory rape violate the Eighth and Fourteenth Amendments to the United States Constitution?

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

No. _____

PATRICK DEWAYNE BETHLEY,
Petitioner,

V.

STATE OF LOUISIANA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT FOR THE STATE OF LOUISIANA

The Petitioner Patrick Dewayne Bethley prays that a writ of certiorari be issued to review the judgment of the Supreme Court for the State of Louisiana.

CITATION TO OPINIONS BELOW

The judgment of the Supreme Court of Louisiana is attached as Appendix A to this Petition. The court's denial of petitioner's application for rehearing is attached as Appendix B to this Petition.

JURISDICTION

The judgment of the Supreme Court of Louisiana was entered on December 13, 1996. See State of Louisiana v. Patrick Dewayne Bethley, Slip op., No. 96-KA-1392, ___ So.2d ___ (La. 1996). A timely application for rehearing was denied on December 30, 1996. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257.

a. Jurisdictional statement of the case

This case presents the federal question of whether the death penalty for statutory rape violates the Eighth and Fourteenth Amendments to the United States Constitution. Patrick Dewayne Bethley was charged in a three-count indictment with aggravated rape of three minor children. The State of Louisiana announced its intention to seek the death penalty under a 1995 amendment to La. R.S. 14:42, which authorizes death as a punishment for the rape of a child under twelve years of age. The trial court granted Mr. Bethley's motion to quash, finding the amendment to be unconstitutional. As provided for by Article 5, Section 5(D) of the Louisiana Constitution, the State of Louisiana filed an appeal directly in the Supreme Court of Louisiana, which was constitutionally compelled to decide the appeal. The court upheld the constitutionality of death as a punishment for statutory rape. Subsequently, the court denied petitioner's application for rehearing. The court's decision in this case is a final judgment under state law and, as a practical matter, has preclusive effect.[1]

In Louisiana today, some 29 defendants are charged with statutory rape and face capital sentencing trials. See Report of the Louisiana Indigent Defender Board, annexed hereto.

b. Statement of jurisdiction

Admittedly, the question whether the decision of the Supreme Court of Louisiana in this case is a final judgment for purposes of 28 U.S.C. § 1257 is a close one. The general rule is that, to be reviewable, a state court judgment must "be final as an effective determination of the

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[1] See Louisiana Code of Criminal Procedure, Article 922; State v. Johnson, 438 So.2d 1091 (La. 1983) (judicial efficiency demands that pretrial decisions entitled to great deference and that they not be revisited unless patently erroneous or unless appellant presents new evidence); State v. Humphrey, 412 So.2d 507 (La. 1982) (same); Day v. Campbell-Grosjean, 260 La. 325, 256 So.2d 105, 107 (La. 1971) (pretrial decisions are law-of-the-case). See also Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., 460 U.S. 1 (1983).

litigation and not of merely interlocutory or intermediate steps therein." Market Street R. Co. v. Railroad Commission, 324 U.S. 548, 551 (1945). As this Court has stated, "[t]his requirement has the support of considerations generally applicable to good administration. It avoids the mischief of economic waste and of delayed justice." Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 65 S.Ct. 1475 (1945).

However, in interpreting 28 U.S.C. § 1257, this Court has also explained that "the requirement of finality is to be given a 'practical rather than a technical construction.'" Cox Broadcasting Corp. v. Cohen, 420 U.S. 469, 95 S.Ct. 1029, 1037, n.7 (1975), quoting Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546 (1949). This Court has stated that the most important competing considerations in deciding whether a state court's judgment is final are "the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other." Dickenson v. Petroleum Conversion Corp., 338 U.S. 507, 511 (1950). Similarly, this Court has noted that "statutorily created finality requirements should, if possible, be construed so as not to cause ... potentially irreparable injuries to be suffered." Mathews v. Eldridge, 424 U.S. 319, 331 n. 11 (1976).

(i) Practical considerations support treating the lower court's decision as a final judgment.

There is every practical reason for this Court to hold the judgment below final. As demonstrated infra, all those concerned -- including petitioner, other statutory-rape defendants in Louisiana, statutory-rape victims in Louisiana and their families, prosecutors in every Louisiana parish, the courts of Louisiana, and the federal courts -- will benefit from a timely determination of the statute's constitutionality. Moreover, all those concerned will be harmed

by piecemeal, proliferating, delayed litigation conducted in the shadow of this important issue.

First of all, the lower court's decision will subject petitioner and similarly-situated defendants to vastly different substantive and procedural rules at trial and may well seriously adversely affect their trial strategies and decisions. Under Louisiana law, all twelve jurors must agree to convict or acquit defendants charged with capital offenses (and all responsive verdicts); in other felony cases, only ten jurors must agree to convict or acquit defendants. See La. C.Cr.P. Art. 782. A capital defendant in Louisiana loses his rights to plead guilty[2] (La. C.Cr.P. Art. 557), to waive trial by jury (La. C.Cr.P. Art. 780), and to be admitted to bail. La. C.Cr.P. Art. 331. Under La. C.Cr.P. Art. 798, the prosecution, but not the defendant, has three additional statutory grounds for challenging prospective jurors for cause when death is a possible sentence.[3] In Louisiana, a capital jury must be sequestered unless both sides agree that it not be.[4] La. C.Cr. P. Art. 791.

Indeed, as the United States Court of Appeals for the Ninth Circuit has pointed out,

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[2] Defendants charged with statutory rape are often willing to plead guilty to spare their victims the trauma of testifying. See Interviewing Child Victims: Guidelines for Criminal Justice System Personnel, When the Victim Is a Child, U.S. Department of Justice, National Institute of Justice at 7 (August 1985) (two-thirds of intra-family sexual abuse cases are settled by guilty plea in substantial part for this reason).

[3] The practice of death-qualifying jurors, in particular, complicates and protracts the jury selection process, and frequently gives rise to issues that continue to devil the litigation throughout the stages of appellate and postconviction review. E.g., Greene v. Georgia, __ U.S. __, 117 S.Ct. 578 (1996); Gray v. Mississippi, 481 U.S. 648 (1987); Wainwright v. Witt, 469 U.S. 412 (1985).

[4] See Hansen, M., Sequestration Little Used, Little Liked: Tensions On Simpson Jury Could be Symptom of Record Confinement, 81-Oct A.B.A. J. 16 (1995) ("many experts believe that the potential drawbacks of sequestering a jury far outweigh any possible benefits.... One study found that sequestered juries in New York produced 16 percent more convictions than unsequestered juries...").

capital defendants face other unique disadvantages that are uncorrectable on appeal following conviction. United States v. Harper, 729 F.2d 1216 (9th Cir. 1984). In Harper, the court pointed to the severe pressure on capital defendants to forego their constitutional rights to a trial and to accept plea bargains to spare their lives. Id. at 1223. The court also stated that the possibility of a death sentence can influence many tactical decisions, including a decision to concede guilt in order to demonstrate remorse.[5] Id.[6] Finally, there is the "emotional stress and strain of a trial in a capital case," which the court termed "extreme in character and sui generis." Id.

In short, a failure by this Court to determine the federal issue at this time will chill the exercise (and limit the availability) of numerous rights of petitioner and other defendants charged with statutory rape in Louisiana.

Another practical consideration supporting a finding of finality is that an immediate decision by this Court will not result in the economic waste that the finality requirement was designed to prevent; on the contrary, prompt resolution of the issue will preserve the judicial, prosecutorial, and defense resources of the State of Louisiana. Until the federal issue is decided, the State of Louisiana will be compelled to provide, at great expense, every defendant charged with statutory rape in Louisiana with a capital sentencing trial, further congesting the state's already crowded criminal dockets. Every jury in each one of these capital sentencing trials will

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[5] See, e.g., Riggins v. Nevada, 112 S.Ct. 1810, 1817, (1992) (Kennedy, J., concurring) ("[i]n a capital sentencing proceeding, assessments of character and remorse may carry great weight and, perhaps, be determinative of whether the offender lives or dies") (citation omitted).

[6] Under Louisiana law, such a concession renders harmless all guilt-innocence errors. Taylor v. State of Louisiana, 669 So.2d 364 (La. 1996) (admission of unconstitutional confession harmless error because defendant conceded guilt during voir dire).

have to be sequestered, at further expense to the state. Prosecutors in every statutory rape case will be required to devote their time and resources to preparation for the capital sentencing trials. Additionally, under Louisiana law every capital defendant must be provided two attorneys out of a limited pool of "death-certified" attorneys, who are compensated at substantially increased rates. See Slip. op. at 14; La. S.C. Rule 31; Chapters 7 and 12, Louisiana Standards of Indigent Defense; Taylor, supra, 669 So.2d at 368. Finally, every defendant who receives a death sentence bypasses the state's intermediate appellate courts and has an absolute right to appeal directly to the Supreme Court of Louisiana. La. C.Cr.P. Art. 912.1. Thus, a prompt decision on the federal issue will ensure that Louisiana's limited judicial, prosecutorial and defense resources are not squandered on needless capital sentencing trials, its already crowded dockets are not further congested, and sentences rendered in the state are not upset by federal courts in later proceedings.[7]

Statutory-rape victims and their families also will be served by prompt adjudication of the federal issue. As explained in an amici curiae brief filed below by, inter alia, the Louisiana Foundation Against Sexual Assault (a victim's rights group) and the National Association of Social Workers, "authorization of capital punishment for child rape [will] greatly intensify the already-substantial fear, stress and guilt endured by young victims who agree to assist law

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[7] The interests of federalism and comity would be further served by prompt resolution of the federal question because it would give proper deference to Louisiana law that favors pretrial resolution of constitutional and other significant legal issues. See, e.g., State v. Jackson, 608 So.2d 949 (La. 1992) (pretrial writ involving admission of evidence of unadjudicated crimes at capital sentencing trials); State v. Bernard, 608 So.2d 966 (La. 1992) (pretrial writ involving admission of victim impact evidence at capital sentencing trials).

enforcement."[8] This is so for at least three reasons. First, "[e]xperts have concluded that requiring a child rape victim to testify in an adversarial proceeding is highly deleterious to her psychological well-being," and the availability of capital punishment will invariably increase the number of times that child rape victims are required to testify because (1) defendants charged with capital rape in Louisiana are not permitted to plead guilty absent a plea bargain; (2) there are generally more pretrial evidentiary hearings in death-penalty cases; and (3) capital trials are bifurcated proceedings often requiring the victim's testimony at both the guilt-innocence trial and the sentencing trial. Id. at 10-12. Second, "child rape victims find the delays that are an inherent part of the criminal justice system to be highly stressful, and it is axiomatic that death penalty cases generally take longer to bring to trial." Id. at 12-13. Finally, "death penalty cases generally receive greater publicity and media scrutiny, which will only intensify the fear, stress, and guilt that child rape victims must endure." Id. at 13. It would be cruel to require statutory-rape victims to endure this additional trauma needlessly.[9]

Thus, the policy considerations underlying the finality requirement would appear to be served by determining now whether petitioner can be sentenced to death for statutory rape rather than subjecting him, other defendants in Louisiana charged with statutory rape, the State of

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[8] Brief of Amici Curiae the Louisiana Foundation Against Sexual Assault, the National Association of Social Workers and its Louisiana chapter, the Louisiana chapter of the National Organization of Women, and the American Civil Liberties Union of Louisiana, at 10.

[9] Indeed, a timely determination of the federal issue by this Court will serve the interests of future statutory-rape victims in Louisiana. According to the amici brief filed below, the vast majority of child rape victims are attacked by family members or close family friends, and "[e]ven prior to passage of the recent amendments to La. R.S. 14:42, many child rape victims and their mothers were loathe to report the crime because of the potential consequences to the offender, the family, and the victim. Authorizing the death penalty for this crime will only make victims and their mothers even less willing to come forward." Id. at 1.

Louisiana, and statutory rape victims and their families, to long and complex litigation which may all be for naught.

(ii) This Court's jurisprudence supports finding the lower court's decision a final judgment.

Far from being unrelated or unresponsive to such practical considerations, the doctrines of §1257 "finality" have evolved to center on them. In Cox, this Court identified at least four categories of cases in which it "has treated the decision on the federal issue as a final judgment for the purposes of 28 U.S.C. § 1257 and has taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts." 95 S.Ct. at 1037 (emphasis added).[10]

A strong argument can be made that this case fits within the fourth category, which this Court in Cox explained encompasses:

> situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal immediately to review the state-court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation. (95 S.Ct. at 1040.)[11]

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[10] As this Court stated in Cox, the finality rule "has not been administered in ... a mechanical fashion." 95 S.Ct. at 1037.

[11] In Cox, itself a fourth category case, this Court explained that it found § 1257's finality requirement satisfied because, although appellant "may prevail at trial on nonfederal grounds, ... if the Georgia court erroneously upheld the statute, there should be no trial at all." 95 S.Ct. at 1041. Likewise, in Mercantile National Bank v. Langdeau, 371 U.S. 555 (1963), this Court stated that "it serves the policy underlying the requirement of finality in 28 U.S.C. § 1257 to determine now which state court appellants may be tried rather than to subject them,

All of these elements would appear to be satisfied in this case. The federal issue has been finally decided in the state courts, and although there are further proceedings pending in which petitioner may prevail on the merits on nonfederal grounds (thus rendering unnecessary review of the federal issue by this Court), reversal of the state court on the federal issue would be preclusive of any further litigation on the issue of whether petitioner can be tried for his life.[12] In addition, as explained supra, strong policy interests in federalism and comity would

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and appellee, to long and complex litigation which may all be for naught if consideration of the preliminary question ... is postponed until the conclusion of the proceedings."

[12] In Cox, the Court defined the federal interest present in that case as follows:

> ...Given these factors -- that the litigation could be terminated by our decision on the merits and that a failure to decide the question will now leave the press in Georgia operating in the shadow of the civil and criminal sanctions of a rule of law and a statute the constitutionality of which is in serious doubt--we find that reaching the merits is consistent with the pragmatic approach that we have followed in the past in determining finality. (95 S.Ct. at 1041-2)

Similarly, a failure of this Court to decide the federal issue presented by this petition will leave criminal defendants in Louisiana charged with statutory rape, and all others concerned, operating in the shadow of the ultimate criminal sanction, the constitutionality of which is in serious doubt. Certainly, the policy interests in this case far surpass those which have satisfied this Court in other fourth-category cases, particularly those in which this Court has accepted jurisdiction solely to clarify the meaning of federal statutes in order to avoid needless trials. See, e.g., Hudson Distributors v. Eli Lilly, 377 U.S. 386, 84 S.Ct. 1273, 12 L.Ed.2d 394 (1964) (finding strong federal policy interest in federal antitrust laws); American Motorists Ins. Co. v. Starnes, 96 S.Ct. 1800, 1803 n.3 (1976) (finding jurisdiction to consider petition for certiorari after state supreme court rejected pretrial challenge to constitutionality of state venue statute); Shaffer v. Heitner, 97 S.Ct. 2569, 2575 (1977) (finding jurisdiction to consider certiorari after state supreme court rejected pretrial, due-process challenge to state statute allowing state court to take jurisdiction of lawsuit by sequestering any property of defendant that happens to be located in state); Mercantile, supra (federal venue statute); Southland Corp. v. Keating, 465 U.S. 1 (1984) (finding strong federal policy interest in contracts to arbitrate); Goodyear Atomic Corp. v. Miller, 486 U.S. 174 (1988) (federal preemption of state safety rules for nuclear facilities threatened by workers' compensation award based on violation of those rules). See also Fort Wayne Books, Inc. v. Indiana, 109 S.Ct. 916, 923 (1989) ("[a]djudicating the proper scope of First Amendment protections has often been recognized by this Court as a 'federal policy' that

be served by settling the federal question now. A prompt decision will ensure that Louisiana's limited judicial, prosecutorial and defense resources are not squandered on needless capital sentencing trials, its already crowded dockets are not further congested, and sentences rendered in the state are not upset by federal courts in later proceedings. Indeed, this Court has identified as an important policy consideration encompassed by § 1257's finality requirement the question whether "immediate rather than delayed review would be the best way to avoid 'the mischief of economic waste and of delayed justice' as well as precipitate interference with state litigation." Cox, supra, 95 S.Ct. at 1037, quoting Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 124 (1945).[13]

The situation presented by this case can also be seen to fit into the third category of cases identified by this Court in Cox, although less obviously than the fourth category. As this Court has more recently interpreted this category, it includes situations where the federal claim has been finally decided, with further proceedings on the merits in the state court to come, but in

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merits application of an exception to the general finality rule").

[13] See also Gillespie v. United States Steel Corp., 379 U.S. 148 (1964) (upholding exercise of appellate jurisdiction when case involved unsettled issue of national significance and when none of the policies of judicial economy served by the finality requirement would be achieved were the case sent back with the important issue undecided but in fact delaying resolution will work "great injustice" on parties); Mills v. Alabama, 384 U.S. 214, 86 S.Ct. 1434, 1436 (1966):

> ...[State's] argument [that state judgement is not final] has a surface plausibility, since it is true that the judgment of the State Supreme Court did not literally end the case. It did, however, render a judgment binding upon the trial court that it must convict Mills under this state statute if he wrote and published the editorial. Mills concedes that he did, and he therefore has no defense in the Alabama trial court. [Awaiting another decision by the state supreme court] would not only be an inexcusable delay of the benefits Congress intended to grant by providing for appeal to this Court, but it would also result in a completely unnecessary waste of time and energy in judicial systems already troubled by delays due to congested dockets.

which later review of the federal issue might cause irreparable harm to one of the parties and waiting for the completion of the future proceedings will simply be a waste of time and resources. See Pennsylvania v. Ritchie, 480 U.S. 39 (1987).[14] In Ritchie, a third-category case, a criminal defendant sought to subpoena the files of a state agency, and the trial court denied the request. An appellate court reversed on the grounds that the denial violated the defendant's rights under the Confrontation and Compulsory Process Clauses, and remanded the case to determine whether the error was prejudicial. The State filed a petition for certiorari in this Court, which this Court granted. The majority acknowledged that there were at least three scenarios under which the federal issue could reach the Court if review was delayed. Id. at 996-7 and n.7. However, despite these scenarios, the Court took a practical approach to the issue of finality. The Court relied in substantial part upon the statement in Mathews that the finality requirement should be construed so as not to cause potentially irreparable injuries to be suffered, pointing out that the Commonwealth would suffer harm if immediate review was not granted. Id. at 997. The Court also explained:

> ... Justice Stevens' dissent apparently would require the Commonwealth to raise a fruitless Sixth Amendment claim in the trial court, the Superior Court, and the Pennsylvania Supreme Court still another time before we regrant certiorari on the question now before us.
>
> The goals of finality would be frustrated, rather than furthered, by these wasteful and time-consuming procedures. Based on the unusual facts of this case, the justifications for the finality doctrine -- efficiency, judicial restraint, and federalism...., would be ill served by another round of litigation on an issue that has been authoritatively

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[14] In Cox, the Court explained this category somewhat differently:

> In the third category are those situations where the federal claim has been finally decided, with further proceedings on the merits in the state court to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case. (95 S.Ct. at 1039.)

decided by the highest state court. (Id. at 997 n.7.)

All of the considerations that led this Court in Ritchie to grant certiorari exist in this case. As explained supra, the harm that petitioner will suffer if this Court delays review is considerable. And it will be a waste of time and resources to allow possibly 29 capital sentencing trials to needlessly occur in Louisiana before this Court settles the federal issue presented by this petition. As in Ritchie, under the facts of this case, the justifications for the finality doctrine -- efficiency, judicial restraint, and federalism -- would be ill served by another round of litigation on an issue that has been authoritatively decided by the highest state court.

Furthermore, the situation presented by this case is indistinguishable from those in second category cases -- save by arid technicalities. Second category cases involve judgments collateral to the merits of the principal claim; in them, the federal issue "finally decided by the highest court in the state[] will survive and require decision regardless of the outcome of future state-court proceedings." Cox, 95 S.Ct. at 1038.[15] In Mercantile National Bank v. Langdeau, 371 U.S. 555 (1963), this Court stated that the finality requirement of § 1257 is satisfied when the highest state court has issued a final order regarding "a separate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising" the cause of action. Id. at 557-8.

The Louisiana Supreme Court's judgment addresses a separate and independent matter that is anterior to the merits and not enmeshed in the factual and legal issues comprising the

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[15] See also N.A.A.C.P. v. Claiborne Hardware Co., 102 S.Ct. 3409, 3422, n.42 (1982) (under rationale that further state proceeding would be completely separate from the merits of the already adjudicated federal issues, Court holds final a state supreme court judgment determining that the First Amendment did not preclude tort liability but remanding for recomputation of damages).

prosecution's principal claims in this case. The clean question of the constitutionality of the Louisiana law authorizing death for that crime clearly is anterior to the merits of the state's claim. Moreover, it is almost certain that, if Mr. Bethley manages to obtain an acquittal or a sentence of life imprisonment without possibility of parole at trial, the State of Louisiana will nonetheless obtain a death sentence against another defendant charged with statutory rape, requiring this Court to decide the federal issue. Therefore, the federal issue will survive and require decision by this Court regardless of the outcome of future state-court proceedings against petitioner.

Indeed, this Court has, in a number of cases, found it had jurisdiction to decide before trial the constitutionality of state criminal statutes challenged collaterally. New York ex rel. Bryant v. Zimmerman, 278 U.S. 63 (1928) (habeas corpus proceeding); Rescue Army v. Municipal Court, 331 U.S. 549 (1947) (writ of prohibition); Madruga v. Superior Court, 346 U.S. 556 (1954) (same). It is true that the statutes in these cases were challenged in collateral proceedings rather than in collateral claims. However, to deny certiorari because this case comes to this Court through the mechanism of a motion to quash as opposed to a habeas corpus proceeding or writ of prohibition would be to rely on a hypertechnical distinction and thus be contrary to this Court's jurisprudence that § 1257 should be interpreted practically and flexibly.[16]

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[16] It has been suggested that second-category cases "arguably involved elements of hardship in addition to the simple burden of proceedings that might prove unnecessary, and this category of finality would be more convincing if it were restricted to such situations." 16 Wright, Miller, Cooper & Gressman, Federal Practice and Procedure § 41010, at 589 (1977). As demonstrated supra, this case involves elements of substantial hardship for petitioner and similarly-situated defendants.

In any event, even if this case does not fit precisely into any of the Cox categories, this Court should nonetheless grant the petition. This Court in Cox did not purport to describe the entire universe of cases in which § 1257's finality requirement could be satisfied despite the potential for further proceedings in state courts; rather, it said that "there are now at least four categories ... of [such] cases." 95 S.Ct. at 1037 (emphasis added).[17] Indeed, before describing the four categories of cases, this Court in Cox explained the overriding rationale of the cases:

> In the cases in the first two categories..., the federal issue would not ... be affected by the proceedings yet to be had because those proceedings ... are wholly unrelated to the federal question. In the other two categories ... the federal issue would be mooted if the petitioner or appellant seeking to bring the action here prevailed on the merits in the later state-court proceedings, but there is nevertheless sufficient justification for immediate review of the federal question finally determined in the state courts. (95 S.Ct. at 1037-8.)

Here, the clean federal issue would not be affected by the capital sentencing trial yet to be had because the legal and factual issues at that trial will be wholly unrelated to the federal question. Moreover, although the federal issue would be mooted if the petitioner prevails on the merits at a capital sentencing trial, there is nevertheless sufficient justification for immediate review of the federal question finally determined in the state court. See supra.

It would, then, be both hypertechnical and unfaithful to Cox's rationale to deny finality in a situation that has so much in common with the cases in several Cox categories, even if it is not found to have all of the precise elements of any one of them. This Court has before it

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[17] For example, this Court's decision in American Export Lines, Inc. v. Alvez, 100 S.Ct. 1673 (1980), does not fit snugly into any of the Cox categories. There, this Court found 1257's final requirement satisfied by a lower court ruling refusing to dismiss one party's claim, reasoning that "the eventual costs, as all the parties recognize, will certainly be less if we now pass on the questions presented here rather than send the case back with those issues undecided.'" Id. at 1676, citing Gillespie v. United States Steel Corp., 379 U.S. 148, 153, 85 S.Ct. 308, 311 (1964).

a judgment of the Supreme Court of Louisiana that is final as a matter of state law, and that is wholly unrelated to any further proceedings that may occur. This case involves the ultimate penalty of death. If this Court grants the petition and reverses the lower court, petitioner will be spared a trial at which his life hangs in the balance and which will be convened pursuant to a statute that is transparently unconstitutional. The State of Louisiana will be spared the expense of paying for this needless trial. If this Court does not grant certiorari, the substantive and procedural rules under which the trial occurs will change radically, and will seriously alter petitioner's trial strategies. Petitioner, moreover, is not alone. Twenty-eight other defendants charged with statutory rape in Louisiana also face death. Their capital sentencing trials will put a tremendous financial strain on the judicial, prosecutorial and defense resources of the State of Louisiana. Finally, the interests of statutory-rape victims and their families will be served by a prompt resolution of the federal issue.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional and statutory provisions. The Eighth Amendment to the Constitution of the United States, which provides in pertinent part:

> Excessive bail shall not be required..., nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part:

> [N]or shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

La. R.S. 14:42, which provides in pertinent part:

> A. Aggravated rape is a rape committed upon a person sixty-five years of age or older or where the anal or vaginal sexual intercourse is deemed to be without lawful consent

of the victim because it is committed ...

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(4) When the victim is under the age of twelve years. Lack of knowledge of the victim's age shall not be a defense.

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C. ... [I]f the victim was under the age of twelve years, as provided by Paragraph A(4) of this section, the offender shall be punished by death or life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence, in accordance with the determination of the jury.

STATEMENT OF THE CASE

This petition for certiorari involves the question of the constitutionality of La. R.S. 14:42, which was amended in 1995 by the Louisiana legislature to authorize death as a penalty for having sexual intercourse with a child under twelve years of age. La. R.S. 14:42 has no mens rea element and a defendant is eligible for the death penalty even if he reasonably mistook the child's age and/or the child consented.

Patrick Dewayne Bethley, who the State alleges is HIV-positive, was charged in a three-count indictment with aggravated rape of three minor children, including his daughter. The State of Louisiana announced its intention to seek death as punishment under La. R.S. 14:42. On April 30, 1996, petitioner filed a motion to quash, challenging the constitutionality of death as a punishment for statutory rape. On June 7, 1996, the trial court granted the motion to quash. On August 5, 1996, the State appealed to the Supreme Court of Louisiana. On August 14, 1996, the State moved to consolidate its appeal with the appeal in State of Louisiana v. Anthony Wilson, No. 96-KA-1392, which motion the court granted.

On December 13, 1996, the Supreme Court of Louisiana upheld the constitutionality of

death as punishment for statutory rape,[18] reversed and vacated the lower courts' decisions granting the motions to quash, and remanded the two cases. Three members of the Court joined a majority opinion (hereinafter, the "majority opinion"). Two members of the Court, Justices Kimball and Victory, issued separate concurring opinions. Chief Justice Calogero and Justice Watson dissented. Petitioner subsequently filed an application for rehearing, which the court denied on December 30, 1996, with Chief Justice Calogero and Justice Watson again dissenting.

REASONS FOR GRANTING THE WRIT

As explained in more detail infra, this Court should grant the petition for certiorari for two of the grounds stated in Rule 10 of this Court's rules:

(1) The Supreme Court of Louisiana has decided an important federal question - whether death is an unconstitutional punishment for statutory rape - in a way that conflicts with the decision of another state court of last resort, the Florida Supreme Court. See Buford v. State, 403 So.2d 943 (Fla.) (death disproportionate penalty for the rape of a child), cert. denied, 454 U.S. 1163 (1981).

(2) The Supreme Court of Louisiana has decided an important question of federal law in a way that conflicts with the relevant decisions of this Court and that has not been, but should be, precisely settled by this Court.

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[18] The court declined to address petitioner's additional claim that Louisiana's capital punishment scheme for statutory rape, including R.S. 14:42 and La. C.Cr.P. Art. 905 et seq., failed to narrow the class of statutory-rapists eligible for the death penalty in a constitutionally-adequate manner. Slip op. at 15 ("our decision is limited to the constitutionality of La. R.S. 14:42(C) and not to the sufficiency of the aggravating circumstances provided in La. C.CR.P. art. 905 et seq."). Accordingly, petitioner concedes that this issue cannot be brought before this Court at this time.

I. DEATH IS A DISPROPORTIONATE PENALTY FOR STATUTORY RAPE AND, THUS, VIOLATES THE EIGHTH AMENDMENT TO THE U.S. CONSTITUTION.

Under the Eighth Amendment, death is an excessive penalty for a crime when it is contrary to "contemporary values" -- that is, "the 'evolving standards of decency that mark the progress of a maturing society." Penry v. Lynaugh, 109 S.Ct. 2934, 106 L.Ed.2d at 286 (1989), citing Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion). This Court has consistently held that "[t]he clearest and most reliable evidence of contemporary values is the legislation enacted by the country's legislatures." Penry, 106 L.Ed.2d at 286.[19] In addition to the actions of legislatures, the Court has "also looked to data concerning the actions of sentencing juries." Penry, 106 L.Ed.2d at 286, citing Enmund v. Florida, 458 U.S. 782, 794-6 (1982). See also Thompson v. Oklahoma, 108 S.Ct. 2687 (1988) (plurality opinion).

Based on the recent actions both of legislatures and sentencing juries, there is, today, an overwhelming national consensus that capital punishment is a disproportionate penalty for the rape of a child. Accordingly, this Court must strike down La. R.S. 14:42 as unconstitutional.

a. Based on virtually all legislative action since 1972, there is a national consensus that death is a disproportionate penalty for statutory rape.

The Louisiana legislature is the first and only legislature in over 20 years to authorize the death penalty for statutory rape. Louisiana is, today, the only state in the nation seeking to execute defendants for this crime. The last time a defendant was executed for rape in the United

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[19] See also Stanford v. Kentucky, 109 S.Ct. 2969, 2976, 106 L.Ed.2d at 318 (1989) (plurality opinion) ("'first,' among the '"'objective indicia that reflect the public attitude toward a given sanction'" are statutes passed by society's elected representatives'"), quoting McCleskey v. Kemp, 418 U.S. 279, 300 (1987), quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976).

States was 1964.[20] There is today no one housed on death row in the United States for the crime of statutory rape or, indeed, for any other crime not involving a homicide.

In 1972, when this Court decided Furman v. Georgia, 408 U.S. 238 (1972), only sixteen states, plus the federal government, authorized capital punishment for the crime of rape.[21] Coker v. Georgia, 433 U.S. 584, 97 S.Ct. 2861, 2866-7, 53 L.Ed.2d 982 (1977). Between 1972 and 1977, thirty-five states passed capital punishment schemes seeking to address the concerns expressed in Furman. Id. at 2867. Of these, only six authorized the death penalty for rape.[22] Id.

In 1977, this Court held that the execution of a defendant for the rape of an adult is unconstitutional under the Eighth Amendment. Coker v. Georgia, supra.[23] At that time, only Georgia was seeking death as a punishment for the rape of an adult,[24] and only Mississippi and

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[20] Sourcebook of Criminal Justice Statistics--1994, United States Department of Justice, Bureau of Justice Statistics at 598. No one has been executed in Louisiana for rape in almost forty years. Foster, B., Dead Rapists: The Fourteen Electrocutions for Rape in Louisiana, 1941-1957, at 28 (forthcoming in The Angolite) (hereinafter, "Dead Rapists") (defendant last executed for rape in Louisiana in 1957).

[21] Guided by the Quaker-designed statutes in Pennsylvania, legislatures began in the Eighteenth Century to lessen the penalty for rape until, at the beginning of the 20th Century, only a few states retained the death penalty for the crime of rape. Bedau, H., Pierce, C., editors, Capital Punishment in the United States (AMS Press, New York), Chapter 3, "Rape, Race and A 'Peculiar Chivalry,' at 38 (hereinafter, Capital Punishment in the United States).

[22] These states were: Louisiana, Georgia, North Carolina, Tennessee, Florida and Mississippi. Id.

[23] Later that same year, this Court held it unconstitutional to execute a defendant for rape and kidnapping. See Eberheart v. Georgia, 433 U.S. 917 (1977) (per curiam).

[24] Three states (Georgia, North Carolina and Louisiana) had statutes authorizing the death penalty for rape, but Louisiana's and North Carolina's statutes were mandatory death penalty statutes that had been declared unconstitutional. See Roberts v. Louisiana, 431 U.S. 633 (1977); Woodson v. North Carolina, 428 U.S. 280 (1976). Thereafter, both the Louisiana and

Florida[25] were seeking death as a punishment for the rape of a child. See 97 S.Ct. at 2868.

In its 1977 decision in Coker, this Court clearly and explicitly limited its holding to the rape of an adult.[26] Slip op. at 4 (Court in Coker "took great pains in referring only to the rape of adult women throughout their opinion, leaving open the question of the rape of a child").[27] However, despite Coker's limited holding, for eighteen years after it was decided, not one state legislature undertook to pass a statute authorizing the death penalty for the rape of a child. Slip op. at 8.[28] Eighteen years later, Louisiana enacted such legislation but, since then, not one

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North Carolina legislatures passed discretionary capital punishment statutes for murder, but not rape. See N.C. Gen. Stat. §§ 15A-2000; 14.27.4 (rape of child under 13 punishable as Class B1 felony).

[25] Tennessee had a statute on the books mandating death as punishment for the rape of a child, but the Tennessee Supreme Court had declared the statute unconstitutional. See Collins v. State, 550 S.W.2d 643 (1977). Today, Tennessee authorizes capital punishment for murder, but, like the Georgia and North Carolina legislatures, the Tennessee legislature has not reenacted capital punishment for the rape of a child. Under current Tennessee law, the maximum penalty for the rape of a child is a sentence of not more than 60 years. See Tenn. Stat. §§ 39-13-203; 40-35-111. Thus, Tennessee has not authorized the death penalty for child rape in twenty years, and the current judgment of the Tennessee legislature is that death is a disproportionate penalty for the rape of a child.

[26] See 97 S.Ct. at 2866 (the question of whether capital punishment is a disproportionate penalty for the "rape of an adult woman[] is now before us"); see also id.; id. at 2867; id. at 2868; id. at 2868-9.

[27] See also Upshaw v. State, 350 So.2d 1358, 1360 (Miss. 1977) ("[i]n Coker the Court took great pains to limit its decision to the applicability of the death penalty for the rape of an adult woman... As we view Coker the Court carefully refrained from deciding whether the death penalty for the rape of a female under the age of twelve years is grossly disproportionate to the crime"); Shue v. State, 366 So.2d 387, 389 (Fla. 1978) (Coker "limited its holding to the facts of that case in which the victim was an adult woman").

[28] Compare Coker, 97 S.Ct. at 2867 (after Furman decision, "[t]hirty-five States immediately reinstituted the death penalty for at least limited kinds of crime... This public judgment as to the acceptability of capital punishment, evidenced by immediate, post-Furman legislative reaction in a large majority of the States, heavily influenced the Court to sustain the death penalty for murder in Gregg...") (emphasis added; citations omitted).

other state has followed suit.

Since Coker, about three more states, plus the federal government, have passed capital punishment statutes directed at Furman's concerns. Death Row, U.S.A., NAACP Legal Defense and Educational Fund (Fall 1995) (38 states now have capital punishment statutes). None of these statutes authorizes death as a penalty for statutory rape.

Today, only two states[29] (Louisiana and Florida) have statutes on the books authorizing death as a penalty for statutory rape, and only Louisiana's statute is operable.[30]

In short, Louisiana's legislature is the first and only legislature since Coker was decided - and the first and only legislature in over 20 years - to authorize the death penalty for statutory rape. Moreover, as the majority opinion concedes (slip op. at 8), Louisiana is the only state in the nation now seeking to execute a defendant for this crime. Furthermore, only two states (Louisiana and Florida) currently have statutes on the books authorizing death as a penalty for statutory rape. Accordingly, there is no doubt that, under numerous decisions of this Court,

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[29] In 1989, relying on the legal maxim quod leges posteriories priores contrarias abrogant, the Mississippi Supreme Court invalidated that state's statute on the ground that another, more recent state statute required capital sentencing juries to make findings based on Enmund v. Florida, supra, which is impossible if the victim was not killed. Leatherwood v. State, 548 So.2d 389 (Miss. 1989), citing Miss. Code Ann. § 99-19-101 (7) (effective on March 29, 1983). Since the Leatherwood decision - and although this Court has squarely held that the constitution does not require that the capital sentencer make Enmund findings (Cabana v. Bullock, 474 U.S. 376, 106 S.Ct. 689 (1986)) - the Mississippi legislature has declined to repeal or amend the statute requiring the Enmund findings, thereby precluding Mississippi prosecutors from seeking death against child rapists. Thus, Mississippi has not authorized the death penalty for child rape since 1983, and the current judgment of the Mississippi legislature is that death is a disproportionate penalty for the rape of a child.

[30] After Coker, the Florida Supreme Court specifically relied on Coker's rationale in holding its statute unconstitutional under the Eighth Amendment. Buford v. State, 403 So.2d 943 (Fla.), cert. denied, 454 U.S. 1163 (1981).

R.S. 14:42's authorization of capital punishment for statutory rape is unconstitutional.[31]

The majority opinion of the Supreme Court of Louisiana contends that the fact that "Louisiana is the only state that presently has a law in effect that provides for the death penalty for the rape of a child less than twelve ... cannot be deemed determinative." Slip op. at 8. See also id. at 10. In so ruling, the majority initially concedes that "[o]ne of the most conservative and acceptable methods of determining the excessiveness of a penalty is to examine the statutes of other states" (slip op. at 7), but then claims, contradictorily, that this method - repeatedly embraced by this Court - "leads only to absurd results." Slip op. at 10. The majority thus feels justified in flagrantly defying this Court's holdings and relying exclusively on the dissents in Coker.

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[31] See Enmund v. Florida, 458 U.S. at 792 ("only a small minority of jurisdictions -- **eight** -- allow the death penalty to be imposed solely because the defendant somehow participated in a robbery," which "weighs on the side of rejecting capital punishment where" defendant did not kill, intend to kill or intend that a killing take place); Coker v. Georgia, 97 S.Ct. at 2867-8 (only **three states** have authorized death penalty for rape of adult in past five years; "[t]he current judgment with respect to the death penalty for rape is not wholly unanimous among state legislatures, but it obviously weighs very heavily on the side of rejecting capital punishment as a suitable penalty for raping an adult woman"); Thompson v. Oklahoma, 101 L.Ed.2d at 713-4 (finding national consensus against execution of defendants under sixteen years of age even though "[m]ost state legislatures have not expressly confronted the question"). See also Ford v. Wainwright, 477 U.S. 399, 408 (1986) ("no [other] State in the Union" authorizes the insane to be executed). Compare Tison v. Arizona, 481 U.S. 137, 107 S.Ct. 1676, 1685-6 (1987) (in holding that felony murderer who was a major actor in a felony and who knew that "death was highly likely to occur" could be executed consistent with the Eighth Amendment, Court relies on the fact that **twenty-two states** authorized the death penalty in such scenarios); Penry v. Lynaugh, 109 S.Ct. 2934, 2955 (1989) (in reaching its holding that the Eighth Amendment does not prohibit the execution of the mentally retarded, the Court relies on the fact that **thirty-two states** permitted the execution of mental retardates); Stanford v. Kentucky, 109 S.Ct. 2969, 2976 (1989) (plurality opinion) (in reaching its holding that the Eighth Amendment does not prohibit the execution of persons who commit their crimes at 16 years of age or older, Court relies on the fact that "**a majority of states [twenty-two]** that permit capital punishment authorize it for crimes committed at age 16 or above").

As petitioner understands it, the majority makes two separate arguments. First, the majority contends that Coker incorrectly "only took into account the recent past in considering what society deems to be cruel and unusual punishment." Slip op. at 10, citing Justice Powell's opinion.[32] Citing to the fact that three other states have authorized capital punishment for child rape within the past quarter century (slip op. at 8), the majority argues that, even though these three state statutes were subsequently invalidated, "the simple fact that they enacted such statutes since the Furman decision may suggest the beginning of a trend." Slip op. at 90.[33]

This argument is untenable for at least four reasons. First, given the indisputable fact that Louisiana's legislature is the first in over 20 years to authorize the death penalty for statutory rape and that Louisiana is currently the only state in the union seeking to execute statutory rapists, it is simply nonsense to claim that there is a national trend in favor of this penalty for this crime. Second, the majority opinion in Coker prevailed and is the law of the land.[34] Under it - and under numerous other decisions of this Court handed down subsequently[35] - courts determine "evolving standards of decency" as they are reflected in current legislative pronouncements, not those dating back a quarter of a century ago. Coker, 97 S.Ct. at 2866 (courts must "seek guidance ... from the objective evidence of the country's

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[32] Justice Powell concurred in the judgment in part and dissented in part. Hereinafter, for purposes of brevity, petitioner refers to Justice Powell's opinion as a dissent.

[33] See also id. at 9 ("While Louisiana remains the sole jurisdiction with such a statute in effect, it does not do so without the suggestion of some trend or suggestion from several other states that their citizens desire the death penalty for such a heinous crime").

[34] See Cooper v. Aaron, 358 U.S. 1, 78 S.Ct. 1401, 30 L.Ed. 19 (1958).

[35] In all of its proportionality death-penalty cases, this Court has considered current legislative determinations. See, e.g., Enmund, Tison, Penry, Coker, Stanford.

present judgment concerning the acceptability of death as a penalty for rape of an adult woman") (emphasis added); id. at 2868.

Third, the majority's argument improperly ignores the historical record in contravention of the Coker holding, which instructed courts to determine evolving standards of decency by "seek[ing] guidance in history..." 97 S.Ct. at 2866 (emphasis added). The historical record with respect to the death penalty for statutory rape is clear. Immediately prior to Furman, sixteen states plus the federal government had death penalty statutes for rape, including child rape. Coker, 97 S.Ct. at 2866. At the time of Coker, only two states authorized death as a penalty for statutory rape. Id. Today, Louisiana is the only state seeking to execute statutory rapists. In short, the historical record demonstrates that the death penalty for child rape is not a harbinger of an inchoate national trend, but an atavism of an early time that is directly at odds with contemporary standards of decency as reflected in current legislative judgments.

Fourth, even if the majority properly considered the actions of the four state legislatures that have authorized death as a penalty for statutory rape within the past quarter century, the decisions of this Court establish that four is an insufficient number of states to establish contemporary standards of decency. If, as Enmund holds, eight states are constitutionally insufficient to establish contemporary standards of decency, then four states obviously are also.

The majority's other argument is that it would be wrong to "look solely at what the legislatures have refrained from doing" because of the "great uncertainty" arising from this Court's Furman decision and because other states may be waiting to observe Louisiana's experience with capital punishment for statutory rape. Slip op. at 9, citing Justice Powell's dissent in Coker; slip op. at 10, citing Chief Justice Burger's dissent in Coker. Here, again, the

majority flagrantly defies the holding of this Court in Coker, and openly states that the reasoning of the dissents in Coker "applies as well to our analysis." Slip op. at 9 (emphasis added).

There are at least three fatal flaws to this argument. First, and again, the majority opinion in Coker, not Justice Powell's or Chief Justice Burger's dissents, prevailed and is the law of the land. In Coker, and numerous subsequent decisions, this Court has looked precisely at what state legislatures have declined to do when considering whether death is a disproportionate penalty. This Court has focused, moreover, on current legislative actions, and has not speculated as to possible future ones. Second, neither in Coker nor any other disproportionality death penalty case has this Court speculated as to the reasons why other states have refrained from authorizing death for a particular crime or a particular class of defendants. This Court has properly recognized that to do so would be to eliminate inter-state comparisons as a method of adjudicating the constitutionality of death as punishment, leaving the members of this Court with only their personal views as an adjudicatory source.

Third and in any event, whatever the force of the argument in 1977 that legislative refusal to impose capital punishment for rapists may have been a result of the unsettled state of the law following Furman, the argument has no force today. In Coker, this Court "took great pains in referring only to the rape of adult women..., leaving open the question of the rape of a child." Slip op. at 4 (emphasis in original). And yet in the years that have passed since Coker was decided, not one state legislature but Louisiana's has enacted a statute authorizing the death penalty for the rape of a child. Therefore, it is simply untenable to attempt to rely on the arguably unsettled state of the law at the time of Coker as an explanation of why Louisiana today stands alone in the nation in seeking to execute defendants convicted of statutory rape.

b. Based on the decisions of juries in this century, there is a national consensus that death is a disproportionate penalty for statutory rape.

Since 1972, the nation's legislatures have almost unanimously refused to give juries the opportunity to impose death sentences on defendants who have been convicted of statutory rape. Accordingly, there is not a great deal of evidence as to the willingness of juries to do so. See Coker, 97 S.Ct. at 2686. However, what evidence exists strongly suggests that juries view death as a disproportionate penalty for statutory rape.

In Coker, the Court reviewed the available evidence concerning the willingness of juries to return death sentences in rape cases, and concluded that this factor weighed heavily in favor of finding capital punishment a disproportionate penalty for rape. Id. at 2686 ("in the vast majority of cases, at least 9 out of 10, juries have not imposed the death sentence" in rape cases). Subsequent analyses have confirmed this finding. See, e.g., Capital Punishment in the United States, supra at 64 ("[b]etween 1923 and 1971, prison records reveal, 2,208 persons were convicted of rape in the state of Texas. Among those offenders, only 5 percent (118) received the death penalty; the rest served a prison sentence").

Data specifically addressing the actions of capital sentencing juries in statutory rape cases is scarce. However, what data exists suggests that juries are **less** likely to impose death as a penalty for the rape of a child than as a penalty for the rape of an adult. See Hunter, R., et al., "The Death Sentencing of Rapists in Pre-Furman Texas (1942-1971): The Racial Dimension," 20 Am.J.Crim.L. 313, 333 (Spring 1993) (hereinafter, "Pre-Furman Texas"). In this highly-refined study, the authors compared pre-Furman Texas rape cases in which the death penalty was imposed with pre-Furman Texas rape cases in which the death penalty was not imposed, seeking to determine what factors, if any, juries may have relied upon, including (but

not limited to) the races and ages of the defendants and victims. Id. at 314; 319; 322-23. The authors concluded:

> Any presupposition of the effect of the victim's age would lead most to conclude that the younger the victim the greater the likelihood of capital punishment for the assailant. Surprisingly, the data illustrates that the opposite seemed to hold true... Almost 58% of those rapists sentenced to imprisonment had victims under 18 years old, while about 48% of the death-sentenced rapists had victims under 18. Therefore, the youth of the victim did not appear to be an extra-legal factor that influenced the sentencing decision.

Id. at 333 (emphasis added).[36]

The actions of juries in Mississippi also suggest that jurors do not view death as a proportionate penalty for statutory rape. As stated in Coker, in 1972, in response to Furman, the Mississippi legislature passed a statute authorizing capital punishment for the rape of a child. Miss. Code Ann. § 97-3-65. In the next thirteen years, Mississippi juries apparently returned only two death sentences under this statute, and in one of the cases a bifurcated capital sentencing trial did not occur.[37]

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[36] See also Capital Punishment in the United States at 57 (chart reporting that in Texas between 1942 and 1971 a defendant was more likely to receive death sentence if rape victim 18 years or older than if rape victim under 18 years old); Wolfgang, M., Reidel, M., "Rape, Racial Discrimination and The Death Penalty, The Rope, The Chair, and the Needle, Capital Punishment in Texas, 1923-1990, at 111-112 (University of Texas, Austin) (hereinafter, "The Needle") (age of victim does not account for documented racial discrimination against executed black rapists who attacked white females).

[37] The Mississippi Supreme Court held capital punishment invalid for the rape of a child as matter of state law in 1989. See Leatherwood v. State, 548 So.2d 389 (Miss. 1989). Mr. Leatherwood, a black man, was tried in 1985. Id. at 392. Previously, the Court had considered the legality of the statute only once, in 1977, in a case tried in 1975. Upshaw v. State, 350 So.2d 1358 (Miss. 1977). In Upshaw, the Court reversed appellant's death sentence because he had not been sentenced after a bifurcated capital sentencing hearing, and remanded the case for such a hearing. Id. at 1361. Given that the case did not appear again before the Mississippi Supreme Court and there is no record of Upshaw being executed, it can safely be assumed that the second jury did not sentence Upshaw to death.

Moreover, the available data pertaining to Louisiana juries also suggests that they have not viewed capital punishment as a proportionate penalty for having sexual intercourse with a child. Only fourteen rapists in the state have been executed since 1941; of these, only one of them (black) is known to have raped a child under twelve (white). Dead Rapists, supra, at Table One (age of victim known in five cases; in only one case was victim under 12 years old).[38]

This Court has consistently held that evolving standards of decency are to be determined by considering the contemporary actions of legislatures and juries. And based on those actions, there is no doubt that death as a penalty for statutory rape is contrary to this nation's standards of decency.

c. The rationale of Coker, Tison and Enmund compels the conclusion that death is a disproportionate penalty for statutory rape.

Under the Eighth Amendment, death as a punishment for a crime also is excessive when it is "'grossly out of proportion to the severity of the crime.'" Penry, 106 L.Ed.2d at 289, quoting Coker, 433 U.S. at 592. In Coker, the Court concluded that the death penalty is grossly out of proportion to the severity of the crime of rape. 97 S.Ct. at 2866. Although the Court in Coker limited its holding to the rape of an adult, the decision's logic and rationale compel the conclusion that death is a disproportionate penalty for statutory rape. The Court's essential finding was that rape, although a serious and reprehensible crime, does not compare with murder

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[38] The majority opinion of the Supreme Court of Louisiana does not dispute that juries have been extremely reluctant to impose capital punishment for rape. Instead, the Court discounts the significance of this fact and, in so doing once again flouts this Court's holdings and seeks refuge in the dissents in Coker and Furman. See Slip op. at 7, n. 6 ("the reluctance of juries to impose the death penalty may reflect the humane feeling that this most irrevocable of sanctions should be reserved for extreme cases. Furman, supra at 388 (Burger, C.J., dissenting)").

and, thus, cannot be punished with death. This finding cannot be persuasively limited to the rape of an adult:

> Rape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life. Although it may be accompanied by another crime, rape by definition does not include the death or even the serious injury to another person. The murderer kills; the rapist, if no more than that, does not. Life is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair. We have the abiding conviction that the death penalty, which is unique in its severity and irrevocability, ... is an excessive penalty for the rapist who, as such, does not take human life..

Coker, 97 S.Ct. at 2869 (emphasis added) (quotation omitted).

In addition to Coker, other post-Furman decisions of this Court support the conclusion that death is a disproportionate penalty for a defendant who has not killed. Since Furman, this Court has never affirmed a death sentence in a case in which a death did not occur. In that time, the Court has twice considered the proportionality of capital punishment for a felony murderer who did not kill. In Enmund v. Florida, 458 U.S. 782 (1982), the Court held that capital punishment is disproportionate for the felony murderer who does not kill, attempt to kill, or intend that a killing take place. In Tison v. Arizona, 481 U.S. 137 (1987), the Court expanded this holding somewhat, ruling that "major participation in [a] felony..., combined with reckless indifference to human life, is sufficient to satisfy the Enmund culpability requirement" for the felony murderer. Id. at 158.

The response of the majority opinion of the Louisiana Supreme Court to this Court's holdings in Enmund, Tison, and Coker is truly bizarre. The majority states that, based on its readings of this Court's decisions, "the Eighth Amendment bars the death penalty for minor crimes under the concept of disproportionality...," and then argues that death is not a

disproportionate penalty for statutory rape because statutory rape is not a minor crime. Slip op. at 12 (emphasis added). This statement reflects a truly disturbing misreading of this Court's precedent. For example, in Enmund, the Court stated "we have no doubt that robbery is a serious crime deserving serious punishment." 458 U.S. at 798, cited at Slip op. at 11. In Coker, the Court stated that "[s]hort of homicide, [rape] is the 'ultimate violation of self.'" 97 S.Ct. at 2869.[39]

Since Coker, only one court, the Florida Supreme Court, has directly addressed the issue of whether capital punishment is a disproportionate penalty for statutory rape. See Buford v. State, 403 So.2d 943 (Fla.), cert. denied, 454 U.S. 1163 (1981). In Buford, the court considered the constitutionality of Section 794.011(2), which authorized the death penalty for persons "eighteen years or older [who] commit[] sexual battery upon a person eleven years of age or younger." 403 So.2d at 950. The court held that the "reasoning of the justices in Coker v. Georgia compels us to hold that a sentence of death is grossly disproportionate and excessive punishment" for the sexual assault of a child, "and is therefore forbidden by the Eighth Amendment as cruel and usual punishment." Id. at 951.

As stated supra, in 1989, the Mississippi Supreme Court held that it did not have to reach the constitutionality of the state's death penalty statute for child rapists because another state statute required capital sentencing juries to make findings based on Enmund v. Florida, which

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[39] The majority also states that, in Enmund, "[f]our of the nine justices of the Supreme Court find [sic] that the death penalty is permissible in situations when the defendant has neither killed or intended to kill anyone." Slip op. at 12 (emphasis added). Needless to say, the findings of four members of this Court is not the law of the land. In any event, the four justices dissenting in Enmund were addressing the culpability of the felony murderer - one who has participated in a crime in which a homicide occurred.

is impossible if the victim was not killed. Leatherwood v. State, 548 So.2d 389, 402-3 (1989).[40] However, a concurring member of the court, Justice Robertson, joined by its one female member, Justice Prather, reached the issue and, like the Florida Supreme Court, concluded that capital punishment for the "rape of a child under fourteen may not be enforced consistent with the Eighth Amendment to the Constitution of the United States." Id. at 403-4.

In short, in recent years, the nation's legislatures, juries and jurists have consistently and uniformly applied the ancient lex talionis[41] principle and have refused to take life when no life has been taken.[42] This Court should do likewise and find that death as a penalty for statutory

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[40] Previously in 1977, in dicta, the Court has indicated that the Eighth Amendment is not violated when a child rapist is executed. See Upshaw v. State, 350 So.2d 1358 (Miss. 1977). However, at the time, the Court (including Justice Robertson) did not have the benefit of twelve (now twenty) years of legislative refusal to authorize death as a penalty for statutory rape.

[41] Granucci remarks of the biblical lex talionis:

> It is generally considered a law of retribution -- the product of a vengeful deity. Envisioning neither mercy nor mitigation of punishment, the lex talionis is, by modern standards, extremely harsh; however, it does prescribe a maximum limit on punishment. 'Talio' is Latin for 'equivalent to' or 'equal.' That the lex talionis requires punishment equal to the crime is made clear by a passage from the Book of Leviticus: "If a man injures his neighbor, what he has done must be done to him: broken limb for broken limb, eye for eye, tooth for tooth. As the injury inflicted, so must be the injury suffered."

Granucci, "Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning, 57 Cal. L. Rev. 839, 844 (1969).

[42] As Professor Packer has observed:

> the retributive justification ... seems to offer the strongest support for limiting the infliction of the death penalty to homicidal offenses. The command of the lex talionis is a simple one: an eye for an eye, a tooth for a tooth, a life for a life. The negative pregnant is equally simple: where a life has not been taken, a life should not be forfeit. Here is a doctrine of proportionality that can readily be grasped and easily applied, at least when the death penalty is at issue. Seen in that light, proportionality is neither too complicated nor too marginally relevant to be employed as a constitutional ideal.

rape is grossly out of proportion to the severity of the crime.[43]

II. CAPITAL PUNISHMENT AS AUTHORIZED BY LA. R.S. 14:42 MAKES NO MEASURABLE CONTRIBUTION TO ACCEPTABLE GOALS OF PUNISHMENT AND IS NOTHING MORE THAN THE PURPOSELESS AND NEEDLESS IMPOSITION OF PAIN AND SUFFERING.

This Court has held that death as a punishment for a crime is excessive when "it 'makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering.'" Penry, 106 L.Ed.2d at 289, quoting Coker, 433 U.S. at 592.[44] This Court has identified "'two principal social purposes'" served by capital punishment: "'retribution and deterrence of capital crimes.'" Penry, 106 L.Ed.2d at 289, quoting Gregg v. Georgia, 428 U.S. at 183, 96 S.Ct. at 2909. This Court has also stated that "retribution as a justification for executing [offenders] very much depends on the degree of [their] culpability." Enmund, at 800, 73 L.Ed.2d at 1140, 102 S.Ct. at 3368.

Capital punishment for statutory rape as authorized by La. R.S. 14:42 is nothing more

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Packer, Making the Punishment Fit the Crime, 77 Harv. L. Rev. 1071, 1078 (1964).

[43] The Court has held that the judicial branch has a constitutional duty "'ultimately to judge whether the Eighth Amendment permits imposition of the death penalty'" for a particular crime or category of offender. Thompson, 101 L.Ed.2d at 717, quoting Enmund, 458 U.S. at 797, 102 S.Ct. at 3368. See also Coker v. Georgia, 97 S.Ct. at 2868 ("the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment"); Harmelin v. Michigan, 111 S.Ct. 2680 (1991) (Kennedy, J., concurring). Compare Stanford v. Kentucky, 106 L.Ed.2d at 324 (plurality opinion) ("we emphatically reject petitioner's suggestion that the issues in this case permit us to apply our 'own informed judgment' ... regarding the desirability of permitting the death penalty for crimes by 16- and 17-year olds"), with Stanford v. Kentucky, 106 L.Ed.2d 306, 325, 326 (1989) (O'Connor, J., concurring in part and concurring in the judgment) (judges have "a constitutional obligation to conduct proportionality analysis"), citing Penry, Tison, Enmund.

[44] In making this determination, the Court has again relied "largely on objective evidence such as the judgments of legislatures and juries." Penry, 106 L.Ed.2d at 289.

than the purposeless and needless imposition of pain and suffering. It makes no measurable contribution to the acceptable goals of punishment, and fails to serve a penal purpose more effectively than a less severe penalty, including both retribution and deterrence.

R.S. 14:42 authorizes capital punishment for defendants who have sexual intercourse with a child under twelve years old even if the defendant reasonably mistook the child's age and/or the child consented to the sexual intercourse.

Because La. R.S. 14:42 has no mens rea element and holds defendants strictly liable for statutory rape regardless of their knowledge or intent, its authorization of capital punishment is unconstitutional. This Court has stated that "[i]t is generally agreed 'that punishment should be directly related to the personal culpability of the criminal defendant.'" Thompson v. Oklahoma, 101 L.Ed. 2d 702, 717 (1988), quoting California v. Brown, 107 S.Ct. 837 (1987) (O'Connor, J., concurring). "American criminal law has long considered a defendant's intention -- and therefore his moral guilt -- to be critical to 'the degree of [his] criminal culpability.'" Enmund, 102 S.Ct. at 3378, quoting Mullaney v. Wilbur, 421 U.S. 684, 698 (1975). The Court stated in another case:

> A critical facet of the individualized determination of culpability required in capital cases is the mental state with which the defendant commits the crime. Deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished.

Tison v. Arizona, 107 S.Ct. 1676, 1687 (1987) (emphasis added).

Because La. R.S. 14:42 authorizes the death penalty for the strict-liability crime of statutory rape, it violates the Eighth Amendment.

III. LA. R.S. 14:42 IS UNCONSTITUTIONAL BECAUSE THE FOUNDING FATHERS WOULD HAVE VIEWED DEATH AS A CRUEL AND UNUSUAL PENALTY FOR HAVING SEXUAL INTERCOURSE WITH A CHILD UNDER TWELVE.

Under the Eighth Amendment, death as a punishment for a crime is excessive when it was "considered cruel and unusual at the time the Bill of Rights was adopted." Penry v. Lynaugh, 106 L.Ed.2d 256, 285 (1989); see also Stanford v. Kentucky, 106 L.Ed. 2d 306, 317 (1989) (plurality opinion).

The imposition of the death penalty for the crime of having sexual intercourse with a child under twelve years of age, regardless of his or her consent, was considered cruel and unusual at the time the Bill of Rights was adopted. While capital punishment at that time was a recognized penalty for the crime of rape, statutory rape was then defined, to quote Blackstone, as carnal knowledge of a child "under ten years of age," not twelve years of age. Blackstone's Commentaries on the Law, Washington Law Book Co. at 840 (Washington, D.C.). See also Hale, M., The History of the Pleas of the Crown, Vol. I, at 628 (statutory rape defined as raping child under 10 years of age with or without consent); Hawkins, Pleas of the Crown, Book I, Chapter 41, at 108 (same).[45]

At the time of the adoption of the bill of rights, a person who had consensual sexual intercourse with a child ten years old or older did not commit any crime. Therefore, it is clear that the founding fathers would have considered executing a person for having consensual sexual intercourse with a child under twelve years of age cruel and unusual punishment.

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[45] Compare Model Penal Code Section 213.3 ("[a] male who has sexual intercourse with a female not his wife is guilty of rape if: ...(d) the female is less than 10 years old"); Model Penal Code Section 213.6 ("[w]hen criminality depends on the child's being below a critical age other than 10, it is a defense for the actor to prove by a preponderance of the evidence that he reasonably believed the child to be above the critical age").

IV. DEATH AS A PENALTY FOR RAPE, INCLUDING STATUTORY RAPE, HAS BEEN ARBITRARILY AND CAPRICIOUSLY INFLICTED, AND THUS VIOLATES THE EIGHTH AMENDMENT AND THE EQUAL PROTECTION OF THE LAW.

Death as a penalty for the crime of rape, including statutory rape, has been arbitrarily inflicted both in the United States and in Louisiana. Accordingly, its use violates both the Eighth Amendment and the equal protection clause.

This Court has consistently held that death as punishment is constitutionally permissible only when there is not a substantial risk that it will be inflicted arbitrarily or capriciously. See Furman v. Georgia, 408 U.S. 238 (1972).[46]

It is by now beyond dispute that the use of death as a penalty for rape, far more than any other crime, is racially discriminatory. Between 1930 and 1972, "3,859 persons [were] executed in the United States.... For rape, ... 455 [were] executed, all but two in the South; 405, or 90 percent, were black...." Bedau, The Case Against the Death Penalty 12-14 (ACLU 1977). See also "Capital Punishment 1992," National Prisoner Statistics, U.S. Dept. of Justice, Bureau of Justice Statistics, NCJ-91533 at 9; Capital Punishment in the United States at 16-17.

All statistical analyses of rape cases since the 1920s have concluded that "racial variables [that is, the races of defendants and victims] are systematically and consistently related to the imposition of the death penalty." The Needle, supra, at 100.[47] One study that reached this

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[46] See also Gregg v. Georgia, 428 U.S. 153, 188 (1976) ("[b]ecause of the uniqueness of the death penalty, Furman held that it could not be imposed under sentencing procedures that create a substantial risk that it would be inflicted in an arbitrary and capricious manner"); Eddings v. Oklahoma, 455 U.S. 104, 110-111 (1982) (one of the "twin objectives" of Eighth Amendment jurisprudence is "consistent and principled application of the death penalty").

[47] See also Pre-Furman Texas, supra, at 316-19 (all studies of imposition of death sentences for rape have found strong racial dimension).

conclusion examined rape cases in seven states, including Louisiana. Id. Considering only the sentences of defendants convicted of rape, this study closely compared pre-Furman death penalty cases and pre-Furman imprisonment cases. Its findings with respect to racial discrimination against black defendants convicted of raping whites are disturbing indeed: "black defendants whose victims were white were sentenced to death approximately 18 times more frequently than defendants in any other racial combination of defendant and victim." Id. at 111-12.[48] See also Id. at 107 ("[i]n Louisiana, Mississippi, Oklahoma, Virginia, West Virginia and the District of Columbia not a single white man was executed for rape over the 42-year period from 1930 to 1972. Together these jurisdictions executed 66 blacks").

This study also reviewed "over two dozen possibly aggravating nonracial variables," including the ages of the victims, that might have accounted for the vastly differing sentences received by black and white defendants. Id. at 118; 108-10. The study found that none of the variables accounted for the racial discrimination. Id. at 118.[49]

These studies are consistent with historical legal provisions in Louisiana under which the rape of black women was not a crime but the rape (and even attempted rape) of white women

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[48] See also Capital Punishment in the United States, supra at 64-5 ("when a black offender was convicted of raping a white woman, he was virtually assured of a death sentence"); Pre-Furman Texas, supra, at 326 ("comparison of both populations confirms that a substantial difference exists in the sentencing of rapists based on race"); id. at 337 ("blacks who raped whites stood the greatest chance of being sentenced to death. This group accounted for over 70% of the total death-sentenced group, but only 2.3% of the imprisoned group. This variation under any circumstance is extreme, and disparity based on the race of the victim was explicit").

Louisiana has executed only fourteen defendants for rape since 1941, and all fourteen were black. Dead Rapists, supra, at 10 and Table One. In addition, all fourteen raped whites save one -- a serial rapist of black women. Dead Rapists, supra, at 10 and Table One.

[49] Since 1941, Louisiana is known to have executed only one defendant for raping a child under twelve; the defendant was black and the child was white. Dead Rapists, supra, at 10.

by slaves mandated capital punishment. See Schafer, J.K., Slavery, The Civil War, and the Supreme Court of Louisiana, at 85 (LSU Press 1994) (prior to Civil War, there was no law in Louisiana criminalizing the rape of black women, whether slave or free); La. Sess. Acts 1857 p. 230 (death penalty mandatory for rape or attempted rape of any white female by a slave).[50]

CONCLUSION

Accordingly, Petitioner respectfully requests that this Court grant the writ of certiorari, and declare La. R.S. 14:42 unconstitutional.

Respectfully submitted,

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[50] See also Brownmiller, Against Our Will: Men, Women, and Rape, at 176 (1975) (rape of black women slaves by their masters was not recognized because the women were the masters' property, and the rape of black women slaves by other white men was only a trespass); 1 Stewarts Ala. Report 320 (1928); Ga. Penal Code of 1816, §§ 33-34; J.H. Franklin, From Slavery to Freedom 188 (1969); S. Elkins, Slavery 59 (1973).

EDITOR'S NOTE

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SUPREME COURT OF L ISIANA

No. 96-KA-1392

STATE OF LOUISIANA

DEC 13 1996

Versus

ANTHONY WILSON

APPEAL FROM CRIMINAL DISTRICT COURT
PARISH OF ORLEANS

consolidated with

No. 96-KA-2076

STATE OF LOUISIANA

VERSUS

PATRICK DEWAYNE BETHLEY

APPEAL FROM FOURTH JUDICIAL DISTRICT
PARISH OF OUACHITA

BLEICH, Justice*

We are called upon to determine the constitutionality of La. R.S. 14:42(C) as it authorizes the death penalty for offenders who rape a victim under the age of 12 years old. We find that R.S. 14:42(C) is constitutional.

FACTS AND PROCEDURAL HISTORY

On December 21, 1995, Anthony Wilson was charged by grand jury indictment with the aggravated rape of a five year old girl. He moved to quash the indictment, alleging that the crime of rape could never be punished with the death penalty.

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*Johnson, J., not on panel. Rule IV, Part 2, § 3.

Victory, J concurs with written reasons.
Calogero, C.J. dissents and assigns reasons.
Watson, J. dissents.
Kimball, J. concurs & assigns reasons

A

The tri urt granted Wilson's motion to quash, lting in this appeal by the state.

Patrick Dewayne Bethley was charged with raping three girls, one of whom was his daughter, between December 1, 1995, and January 10, 1996. The ages of the little girls at the time of the rape were five, seven, and nine. Furthermore, the State alleges that at the time of the alleged crimes, Bethley knew that he was HIV positive. Bethley filed a motion to quash urging the unconstitutionality of La. R.S. 14:42(C). The trial court granted Bethley's motion to quash. Although finding La. R.S. 14:42(C) would pass constitutional muster under the Eighth Amendment and the Equal Protection clause of the United States Constitution and Article I, § 20 of the Louisiana Constitution, the trial court held La. R.S. 14:42(C) unconstitutional because the class of death eligible defendants was not sufficiently limited. That ruling resulted in an appeal.

DISCUSSION

The thrust of both defendants' arguments is that the imposition of the death penalty for a crime not resulting in a death is "cruel and unusual punishment" and therefore unconstitutional under the Eight Amendment to the United States Constitution and Article I, § 20 of the Louisiana Constitution of 1974.

The phrase "cruel and unusual punishment" found in the Eighth Amendment and in Article I, § 20 takes its roots from the English Bill of Rights of 1689. Mun, *Mandatory Life Sentence Without Parole Found Constitutionally Permissible For Cocaine Possession*, 67 Wash. L. Rev. 713, 714 (1991). The English version of the phrase appears to prohibit punishments unauthorized by statute and beyond the jurisdiction of the court, as well as those disproportionate to the offense committed. *Id.*, at 715. However, the American drafters of the Eight Amendment were

primari ncerned with proscribing "tortures" an er "barbarous" methods of punishment such as pillorying, decapitation, and drawing and quartering. *Id.* Therefore, the American courts virtually ignored the Eighth Amendment since the barbaric practices proscribed had become obsolete. *Id.*

Not until the nineteenth century did the Supreme Court recognize that the scope of the Eighth Amendment might be broader that originally thought and include the prohibition of disproportionately excessive sentences. See *Weems v. United States*, 217 U.S. 349 (1910). The years since *Weems*, supra, have seen a development of the Eighth Amendment's "cruel and unusual punishment" clause. As Chief Justice Warren said, "(t)he Amendment must draw its meaning from the evolving standards of decency that mark the maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). Therefore, the Eighth Amendment bars not only those punishments that are barbaric but also those that are excessive.

A punishment is excessive and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more that the purposeful and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime. *Gregg v. Georgia*, 428 U.S. 153 (1976).

EXCESSIVE PUNISHMENT ARGUMENT

The defendants' primary argument is that death is a disproportionate penalty for the crime of rape. The defendants' contention is based on *Coker v. Georgia*, 433 U.S. 584 (1977) decided by the Supreme Court in a plurality opinion.[1] The

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[1]Justice White announced the judgment of the Court joined by Justices Stewart, Blackmun, and Stevens. Justice Brennan and Justice Marshall filed separate concurring opinions finding the death penalty to be cruel and unusual punishment in all circumstances. Justice Powell concurred in the judgment in part and dissented in part finding that death is disproportionate punishment for the crime of raping an adult woman where, as is this case, the crime was not committed with excessive brutality and the victim did not sustain serious or lasting injury. Chief Justice Burger dissented, joined by Justice Rehnquist, concluding that he would leave to the States the task of legislating in this area

Coker [illegible] rejected capital punishment as a penalty [illegible] the rape of an adult woman saying: "Although rape deserves serious punishment, the death penalty, which is unique in its severity and irrevocability, is an excessive penalty for the rapist who, as such and as opposed to the murderer, does not take human life." *Coker*, supra at 585. The plurality took great pains in referring only to the rape of **adult women** throughout their opinion[2], leaving open the question of the rape of a child.

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of the law.

[2]The various justices, either in the plurality opinion, concurring opinion, or dissenting opinion, refer to "adult woman" fourteen times:
(1) Justice White, writing for the plurality, writes: "That question, with respect to rape of an **adult woman**, is now before us." *Coker*, supra at 592.
(2) Justice White: "...we seek guidance...concerning the acceptability of death as a penalty for rape of an **adult woman**." *Id.* at 593.
(3) Justice White: "...4 of the 16 States did not take the mandatory course and also did not continue rape of an **adult woman** as a capital offense." *Id.*, at 595.
(4) Justice White: "The upshot is that Georgia is the sole jurisdiction...that authorizes a sentence of death when the rape victim is an **adult woman**...." *Id.*, at 596.
(5) Justice White: "...but it obviously weighs very heavily on the side of rejecting capital punishment as a suitable penalty for raping an **adult woman**." *Id.*, at 596.
(6) Justice White: "...death is indeed a disproportionate penalty for the crime of raping an **adult woman**." *Id.*, at 597.
(7) Justice Powell, concurring in part and dissenting in part, writes: "...ordinarily death is disproportionate punishment for the crime of raping an **adult woman**." *Id.*, at 601.
(8) Chief Justice Burger, in his dissent joined by Justice Rehnquist, writes: "Since the Court now invalidates the death penalty as a sanction for all rapes of **adults**...." *Id.*, at 611.
(9) Chief Justice Burger: "Georgia is the sole jurisdiction...that authorizes a sentence of death when the rape victim is an **adult woman**." *Id.*, at 613.
(10) Chief Justice Burger: "...Louisiana and North Carolina have enacted death penalty statutes for **adult rape**...." *Id.*, at 613.
(11) Chief Justice Burger: "Failure of more States to enact statutes imposing death for rape of an **adult woman**...." *Id.*, at 614.
(12) Chief Justice Burger: "...Georgia has been the only State whose **adult** rape death penalty statute has not otherwise been invalidated...." *Id.*, at 615.
(13) Chief Justice Burger: "...an appropriate punishment for the rape of an **adult woman**...." *Id.*, at 615.

The de. ants argue that the *Coker* findings cant e limited to the rape of an adult. They contend the following words used by the Court would apply with equal force to the crime of statutory rape when no life is taken:

> "Rape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life. Although it may be accompanied by another crime, rape by definition does not include the death or even the serious injury to another person. The murderer kills; the rapist, if no more than that, does not. Life is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair. We have the abiding conviction that the death penalty, which is unique in its severity and irrevocability,... is an excessive penalty for the rapist who, as such, does not take human life." *Coker*, supra at 598.[3]

The *Coker* plurality further discusses rape as a serious crime, finding it "highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity and autonomy of the female victim. Short of homicide, it is the ultimate violation of self." *Id.*, at 597. These scathing descriptions of rape refer to the rape of an adult female. While the rape of an adult female is in itself reprehensible, the legislature has concluded that rape becomes much more detestable when the victim is a child.

La. R.S. 14:42(C) was amended by Acts 1995, No. 397, §1 to allow for the death penalty when the victim of rape is under the age of twelve.[4] Rape of a child

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(14) Chief Justice Burger: "...rejecting capital punishment as a suitable penalty for raping an **adult woman**...." *Id.*, at 618.

[3] The contention that the harm caused by a rapist is less serious than that caused by a murderer is apparently not subscribed to by all rape victims. In some cases women have preferred death to being raped or have preferred not to continue living after being raped. Karp, David J., *Coker v. Georgia: Disproportionate Punishment and the Death Penalty for Rape*, 78 Columbia L. Rev. 1714, 1720 (1978).

[4] R.S. 14:42 (A) defines aggravated rape as anal or sexual intercourse committed without the lawful consent of the victim. When the victim is under the age of 12, by definition that victim has not lawfully consented and ignorance of the victim's age is not a defense.

less tha elve years of age is like no other crime ıce children cannot protect themselves, the State is given the responsibility to protect them. Children are a class of people that need special protection; they are particularly vulnerable since they are not mature enough nor capable of defending themselves. A "maturing society", through its legislature has recognized the degradation and devastation of child rape, and the permeation of harm resulting to victims of rape in this age category. The damage a child suffers as a result of rape is devastating to the child as well as to the community. As noted previously, in determining whether a penalty is excessive, the Supreme Court has declared that we should take into account the "evolving standards of decency", and in making this determination, the courts should not look to their own subjective conceptions, but should look instead to the conceptions of modern American society as reflected by objective evidence. *Coker*, supra at 592. As evidence of society's attitudes, we look to the judgment of the state legislators[5], who are representatives of society.

Louisiana's legislature determined a "standard of decency" by amending La. R.S. 14:42(C) to permit the death penalty in cases of aggravated rape when the victim is less than twelve, and deference must be given to that decision. The legislature alone determines what are punishable as crimes and the proscribed penalties. *State v. Dorothy*, 623 So.2d 1276 (1983); *State v. Baxley*, 94-2982 (La. 5/22/95); 656 So.2d 973. The legislature is not required to select the least severe penalty for the crime as long as the selected penalty is not cruelly inhumane or disproportionate to the offense. *Gregg*, supra at 175. Furthermore, legislative enactments are presumed constitutional under both the Federal and the State

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[5]La. R.S. 14:42(C) was amended by Acts 1995, No. 397, §1 of the Louisiana Legislature. This amendment began as House Bill 55 which passed in the House of Representatives with a vote of 79 yeas to 22 nays. The Bill was then sent to the Senate which passed it with a vote of 34 yeas to 1 nay. The Bill was then signed into law by Governor Edwards on 6/17/95 to become effective on 8/15/95.

Consti ıs. *Gregg v. Georgia*, 428 U.S. 153 (1' *State v. Griffin*, 495 So.2d 1306 (La. 1986). The party challenging the constitutionality of a statute bears a heavy burden in proving the statute to be unconstitutional. *Gregg*, supra at 175; *State v. Griffin*, supra at 1308. This is true in part because the constitutional test is intertwined with an assessment of contemporary standards, and the decisions of the legislature are indicative of such standards.[6] "In a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people." *Furman v. Georgia*, 408 U.S. 238 at 383 (1972) (Burger, C.J., dissenting). The courts must exercise caution in asserting their views over those of the people as announced through their elected representatives.

One of the most conservative and acceptable methods of determining the excessiveness of a penalty is to examine the statutes of the other states. *Gregg*, supra at 179. The *Coker* court summarized the last 50 years of the history of the death penalty, recognizing that just prior to the *Furman* decision in 1971, just 16 states plus the Federal Government authorized the death penalty for rape. *Coker*, supra at 593. Following *Furman's* invalidation of most death penalty statutes, 35 states immediately reinstituted death penalty statutes; however, only 3 of the states which had previously included rape as a capital offense reinstated rape of an adult woman as a crime deserving of the death penalty, and none of the states that had not previously recognized the death penalty for rape included it among capital

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[6]Another body of people play a role in determining the contemporary standards of our society. That body is the juries who make the determination of whether a certain defendant deserves the death penalty for his particular crime. The *Coker* Court concluded that "in the vase majority of cases, at least 9 out of 10, juries have not imposed the death sentence [in rape cases]." *Coker*, supra at 596-597. However, in drawing this conclusion, the Court does not say whether these rape cases were the rape of an adult or of a child. Moreover, the reluctance of the juries to impose the death penalty may reflect the humane feeling that this most irrevocable of sanctions should be reserved for extreme cases. *Furman*, supra at 388 (Burger, C.J., dissenting).

felonie , at 594. The three states reinstituting death penalty for rape were Georgia, North Carolina, and Louisiana. *Id.* North Carolina's and Louisiana's laws were subsequently invalidated since they mandated the death penalty for those offenders found guilty.[7] *Id.* When Louisiana and North Carolina revised their statutes following the invalidation, they only permitted the death penalty for murder and not rape. *Id.* Georgia's law permitting the death penalty for the rape of an adult woman was invalidated by *Coker*. The *Coker* court used this data as an indication of society's failure to endorse the death penalty. However, this was with reference to adult women.

Louisiana is the only state that presently has a law in effect that provides for the death penalty for the rape of a child less than twelve. This fact, however, cannot be deemed determinative. The *Coker* court pointed out in its discussion of the history of the death penalty that three states, Florida, Mississippi, and Tennessee authorized the death penalty in rape cases when the victim was a child and the offender was an adult. *Coker*, supra at 595. The Tennessee statute was invalidated in 1977 because the death sentence was mandatory.[8] *Id.* And as previously noted, Florida's and Mississippi's death penalty statutes were invalidated in 1981 and 1989 respectively. The Florida Supreme Court found the *Coker* analysis controlling in its invalidation of their statute, but the Mississippi Supreme Court invalidated the death penalty for the rape of a child without ever passing on the constitutionality of the law.[9] Even though these states's statutes were subsequently invalidated, the

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[7] see *Woodson v. North Carolina*, 428 U.S. 280 (1976) and *Roberts v. Louisiana*, 428 U.S. 325 (1976).

[8] *Collins v. State*, 550 S.W. 2d 643 (Tenn. 1977).

[9] Florida and Mississippi have statutes providing for the death penalty in the case of rape of a child under the age of twelve, but recent jurisprudence has ruled these laws unconstitutional.

The Florida Supreme Court found the analysis in *Coker* controlling and held that "the sentence of death is grossly disproportionate and excessive punishment

simple . . . that they enacted such statutes since th. *rman* decision may suggest the beginning of a trend and public opinion favoring such penalties- an evolution of a standard to deal with this heinous crime.

As Justice Powell wrote in his dissent in *Coker*:

> "Considerable uncertainty was introduced into this area of the law by this Court's Furman decision. A large number of States found their death penalty statutes invalidated; legislatures were left in serious doubt by the expressions vacillating between discretionary and mandatory death penalties, as to whether this Court would sustain any statute imposing death as a criminal sanction. **Failure of more States to enact statutes imposing death for rape of an adult woman may thus reflect hasty legislative compromise** occasioned by time pressures following Furman, a desire to wait on the experience of those States which did enact such statutes, or simply an accurate forecast of today's holding." *Coker*, supra at 614. (Emphasis supplied)

This reasoning applies as well to our analysis. Since *Coker*, only Florida's statute has been invalidated under its reasoning. Mississippi's statute and Tennessee's statute were invalidated for infirmities in the statute or sentencing schemes of their respective states. While Louisiana remains the sole jurisdiction with such a statute in effect, it does not do so without the suggestion of some trend or suggestion from several other states that their citizens desire the death penalty for such a heinous crime.

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for the crime of sexual assault." *Buford v. State*, 403 So.2d 943 (1981), cert. denied, 454 U.S. 1163 (1981).

The Mississippi Supreme Court held that "under present statutory authority the maximum punishment upon conviction of this crime [rape of a child under twelve] is life imprisonment," and did not reach the constitutional question. *Leatherwood v. State*, 548 So. 2d 389 (Miss. 1989). Under Mississippi law at the time, upon conviction of a defendant of a capital offense, the court conducts a separate sentencing proceeding to determine the sentence. The sentencing guidelines for the death penalty require a finding that the defendant actually killed, attempted to kill, intended that a killing take place, or contemplate lethal force be employed. Miss.Code Ann. § 99-19-101 (Supp. 1988) Therefore, a conviction of rape did not meet the requirements for the imposition for the death penalty.

The *Coker* Court only took into account the recent past in considering what society deems to be cruel and unusual punishment. *Coker*, supra at 614 (Powell, dissenting). We cannot look solely at what the legislatures have refrained from doing under conditions of great uncertainty arising from the Supreme Court's "less than lucid holdings on the Eighth Amendment." *Id.*, at 614. The fact that Louisiana is presently the sole state allowing the death penalty for the rape of a child is not conclusive. There is no constitutional infirmity in a state's statute simply because that jurisdiction chose to be first. Statutes applied in one state can be carefully watched by other states so that the experience of the first state becomes available to all other states. *Coker*, supra at 616 (Burger, C.J., dissenting). That one State is "presently a minority does not, in my view, make [its] judgment less worthy of deference. Our concern for human life must not be confined to the guilty; a state legislature is not to be thought insensitive to human values because it acts firmly to protect the lives and related values of the innocent." *Id.* The needs and standards of society change, and these changes are a result of experience and knowledge. If no state could pass a law without other states passing the same or similar law, new laws could never be passed. To make this the controlling factor leads only to absurd results. Some suggest that it has been over a year since Louisiana has amended its law to permit the death penalty for the rape of a child, and that no other state has followed suit. Since its enactment, the statute has been under constant scrutiny. It is quite possible that other states are awaiting the outcome of the challenges to the constitutionality of the subject statute before enacting their own.

CRIME WITHOUT DEATH

It has been argued that the death penalty should not be an option when the crime committed produces no death. The Supreme Court has held that the death

penalty an excessive penalty for a robber wh es not take a human life. *Enmund v. Florida*, 458 U.S. 782 (1982). In *Enmund*, the defendant was the driver of the getaway car. His accomplices had robbed and shot two people. The shooter and Enmund were convicted of first degree murder and sentenced to death. The Supreme Court overturned Enmund's sentence of death holding that the Eight Amendment does not permit the imposition of the death penalty of a defendant who aids and abets a felony in course of which murder is committed by others but who does not himself kill, attempt to kill, or intend that killing take place or that lethal force will be employed. *Enmund*, supra at 795. The Court goes on to say that "we have no doubt that robbery is a serious crime deserving serious punishment. It is not, however, a crime 'so grievous an affront to humanity that the only adequate response may be the penalty of death.'" *Enmund*, supra at 798 (quoting *Gregg v. Georgia*, 428 U.S. 153, 184 (1976)). The Court focused on Enmund's conduct in determining the appropriateness of the death penalty. In *Enmund*, the defendant simply aided and abetted a robbery which, as the Court holds, is not deserving of the death penalty. However, La. R.S. 14:42(C) contemplates a defendant who rapes a child. The legislature has determined that this crime is deserving of the death penalty because of its deplorable nature, being a "grievous affront to humanity."

Justice O'Connor, joined by Chief Justice Burger, Justice Powell, and Justice Rehnquist, dissented in *Enmund* finding that the "death penalty is not disproportionate to the crime of felony murder, even though the defendant did not actually kill or intend to kill his victims." *Enmund*, supra at 826 (O'Connor, J. dissenting). Justice O'Connor continues saying that the Court should not only consider contemporary standards in deciding if the death penalty is disproportionate to the crime, but should also consider the harm the defendant caused to the victim. *Enmund*, supra at 816. Contemporary standards as defined by the legislature

indicat t the harm inflicted upon a child when s is tremendous. That child suffers physically as well as emotionally and mentally, especially since the overwhelming majority of offenders are family members. Louisiana courts have held that sex offenses against children cause untold psychological harm not only to the victim but also to generations to come.

> "Common experience tells us that there is a vast difference in mental and physical maturity of an adolescent teenager...and a pre-adolescent child...It is well known that child abuse leaves lasting scars from generation to the next...such injury is inherent in the offense." *State v. Brown*, 660 So.2d 123, 126 (La.App. 2d Cir. 1995).
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> "...Aggravated rape inflicts mental and psychological damage to its victim and undermines the community sense of security. The physical trauma and indignities suffered by the young victim of this offense were of enormous magnitude..." *State v. Polkey*, 529 So.2d 474 (La. App. 1 Cir. 1988).
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> "...the child's tender age made her particularly vulnerable and capable of resisting...considering acutely deleterious consequences of conduct on an eight-year-old child." *State v. Jackson*, 658 So.2d 722 (La. App. 2d Cir. 1995).

Four of the nine justices of the Supreme Court find that the death penalty is permissible in situations when the defendant has neither killed or intended to kill anyone.[10] The Court in *Coker* went even further in *Tison v. Arizona*, 481 U.S. 137 (1987), when it held that the death penalty is not disproportionate when the defendant plays a major part in a felony that results in murder, although the defendant did not actually commit the murder, and the defendant's mental state is only one of reckless indifference to life. The Court also declined to draw a clear line between crimes that warrant the death penalty and those that do not. *Tison*, supra at 157.

While the Eighth Amendment bars the death penalty for minor crimes under the concept of disproportionality, the crime of rape when the victim is under the

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[10] see Justice O'Connor's dissent in *Enmund*, supra, joined by Chief Justice Burger, Justice Powell, and Justice Rehnquist.

age of ive is certainly not a minor crime. T oker Court recognized the possibility that the degree of harm caused by an offense could be measured not only by the injury to a particular victim but also by the resulting public injury. This implies that some offenses, in particular the rape of a child, might be so injurious to the public that death would not be disproportionate in relation to the crime for which it is imposed. "In part, capital punishment is an expression of society's moral outrage at particularly offensive conduct. This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs." *Gregg*, supra at 183.

Thus, we conclude that given the appalling nature of the crime, the severity of the harm inflicted upon the victim, and the harm imposed on society, the death penalty is not an excessive penalty for the crime of rape when the victim is a child under the age of twelve years old.

ARBITRARY AND CAPRICIOUS APPLICATION

When a sentencing body is given such discretion as to determine whether a life should be taken, that discretion must be suitably directed and limited so as to minimize the risk of arbitrary and capricious application. *Gregg*, supra at 189. The state's capital-sentencing scheme must narrow the class of persons eligible for the death penalty. The narrowing can be done in one of two ways: (1) the legislature may itself narrow the definition of capital offenses, or (2) the legislature may broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase. *Lowenfield v. Phelps*, 484 U.S. 231 (1988). Louisiana has chosen the first method; the legislature has narrowed the definition of offenses which are punishable by death during the guilt phase. The Supreme Court has held this sentencing scheme constitutional since the class

of death eligible defendants are narrow and then a separate sentencing phase, allowance is made for the consideration of mitigating circumstances. *Id.*, at 246.

The jury charged with the task of deciding between death or some other penalty is not given unbridled discretion in the decision making process. The Louisiana Code of Criminal Procedure provides guidelines which must be followed to ensure the appropriate outcome. The trial is bifurcated with a separate sentencing hearing; if the defendant is indigent, he is represented by a qualified attorney appointed from a list of "death-certified" attorneys throughout the state; the jury must find beyond a reasonable doubt at least one aggravating factor; the defendant is allowed to present any relevant mitigating factors; and review of any guilty verdict in a capital case is mandatory.

It is argued by the defendants that the aggravating circumstances provided in La. C.Cr.P. art. 905 et seq. are directed towards first degree murder situations only. Article 905.2, in referring to the sentencing hearing, mandates a consideration of the offense, the character and propensities of the offender, and the impact that the death of the victim has had on the family members. The defendants further point to the aggravating circumstances listed in Article 905.4, one of which must be present in order to impose guilt with the instant statute. Obviously, these circumstances were initially to apply only to first degree murder, but many of them apply to the crime of rape of a child under twelve as well.[11] Although it may have

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[11]Of the aggravating circumstances listed in Article 905.4, the following could possibly apply to La. R.S. 14:42(C):

> (1) The offender was engaged in the perpetration or attempted perpetration of aggravated rape, forcible rape, aggravated kidnapping, second degree kidnapping, aggravated burglary, aggravated arson, aggravated escape, assault by drive-by shooting, armed robbery, first degree robbery, or simple robbery.
> (3) The offender has been previously convicted of an unrelated murder, aggravated rape, aggravated burglary, aggravated arson, aggravated escape, armed robbery, or aggravated kidnapping.

been m rudent for the legislature to enact additic ircumstances which would relate to the crime of aggravated rape when it amended La. R.S. 14:42 to permit the death penalty, this omission does not in and of itself make the statute unconstitutional. Regardless, our decision is limited to the constitutionality of La. R.S. 14:42(C) and not to the sufficiency of the aggravating circumstances provided in La. C.CR.P. art. 905 et seq.

The fact that an aggravating circumstance, the victim being under the age of twelve years old, is an element of the crime itself does not make the statute constitutionally infirm. The Supreme Court has held that even when the only aggravating circumstance found by the jury is identical to an element of the crime, the death sentence was not invalid. *Lowenfield*, supra at 246.

Lowenfield was charged with killing five people, and was convicted on three counts of first degree murder; the aggravating circumstance of "knowingly creat[ing] a risk of death or great bodily harm to more than one person" was also an element of the crime. *Lowenfield*, supra at 241. Lowenfield argued that the overlap left the jury free to merely repeat its findings from the guilty phase at the

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(5) The offender has offered or has been offered or has given or received anything of value for the commission of the offense.
(7) The offense was committed in an especially heinous, atrocious or cruel manner.
(8) The victim was a witness in a prosecution against the defendant, gave material assistance to the state in any investigation or prosecution of the defendant, or was an eye witness to a crime alleged to have been committed by the defendant or possessed other material evidence against the defendant.
(10) The victim was under the age of twelve years or sixty-five years of age or older.
(12) The offender was engaged in the activities prohibited by R.S. 14:107.1(C)(1):

> "No person shall commit ritualistic mutilation, dismemberment, or torture of a human as part of a ceremony, rite, initiation, observance, performance, or practice."

sentenc... phase. *Id.* The Supreme Court reje... his argument noting the narrowly defined class of defendants subject to the death penalty due to the legislature's limitations of first degree murder. *Id.* The Court found that the narrowing function could be performed at the guilt phase or the sentencing phase. *Id.*

The same is true in this case. The class of offenders is limited to those who rape a child under the age of twelve. Therefore, not every rapist will be subject to the death penalty, just as every murderer is not subject to the death penalty. We find the class sufficiently narrow following *Lowenfield.*

Much has been made of why eleven year old children are protected by such severe penalties but not twelve year olds. This is not a decision for this Court to make. The legislature is given the power to make the laws and they determined where the line should be drawn, and they drew it between the ages of eleven and twelve. La. R.S. 14:30, first degree murder, as well as La. C.Cr.P. art. 905.4(10) use the same line. Distinctions must be drawn and the legislature is in the best position to make these distinctions.

La. R.S. 14:42(C) has been challenged as unconstitutional because it permits the death penalty without a finding of intent[12]. The defendants argue that this makes the rape of a child a more severe crime than murder since first degree murder requires a finding of specific intent to kill. They argue that once a rapist is found guilty of raping a child under twelve he automatically would get the death penalty, while the murder must be found guilty of killing someone plus the specific intent to do so before he can be subject to the death penalty. This is not true. The

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[12]La. R.S. 14:42(A): Aggravated rape is a rape committed upon a person sixty-five years of age or older or where the anal or vaginal sexual intercourse is deemed to be without lawful consent of the victim because it is committed under any one or more of the following circumstances:

(4) When the victim is under the age of twelve years. Lack of knowledge of the victim's age shall not be a defense.

statute ; not make the death penalty automatic he rapist as opposed to the murdered. Once the rapist is found guilty, he proceeds to the sentencing hearing in which he is permitted to introduce any mitigating evidence. Louisiana Code of Criminal Procedure article 905.5 lists several mitigating circumstances that may be considered in the determination of the sentence for the defendant in this type of case. Article 905.5(d) provides: "The offense was committed under circumstances which the offender reasonably believed to provide... extenuation for his conduct." Article 905.5(h) provides: "Any other relevant mitigating circumstance. It is argued, for example, a seventeen year old may have what he thinks in consensual sex with a girl that he believes is thirteen or fourteen, but is in reality a pre-pubescent eleven year old. This "consensual sex" is actually aggravated rape, and because the victim was under twelve, the rapist is eligible for the death penalty. However, the death penalty is not the only option for the defendant. If he is found guilty under La. R.S. 14:42, in his sentencing phase, he will be allowed to introduce evidence that he truly thought the victim was of age, based on appearance or representations.[13] These safeguards will ensure that the death sentence will not be imposed on a defendant when the circumstances of his crime do not justify that penalty. This is evidenced by the few number of rape cases where the death penalty was actually imposed. Juries will reserve such an irrevocable penalty for the cases which are truly heinous and atrocious to impose the death penalty.

Rape of a child in an intentional crime in and of itself. One does not "accidentally" rape a child. The only accident which could occur is accidentally raping an eleven year old as opposed to a twelve year old.

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[13] Furthermore, the legislature, if it deems it appropriate, is empowered to add specific language regarding mistake of age as a mitigating factor to this article in connection with this crime.

sufficiently narrow so as not to lead to arbitrary and capricious application.

GOALS OF PUNISHMENT

Two legitimate goals of punishment are retribution and deterrence. *Gregg*, supra at 183. The defendants argue that the death sentence in the case of child rape fails to meet either of these goals. They say the imposition of the death penalty will have a chilling effect on the already inadequate reporting of this crime. Since arguably, most child abusers are family members, the victims and other family members are concerned about the legal, financial and emotional consequences of coming forward. According to defendants, permitting the death penalty for the crime will further decrease the reporting since no child wants to be responsible for the death of a family member. But what defendants fail to understand is that the child is not the one responsible. The child is the innocent victim. The offender is responsible for his own actions. The subject punishment is for the legislature to determine, not this Court.

Self-help is not permitted in our society, so there is a need for retribution in our criminal sanctions. The death penalty for rape of a child less than twelve years old would be a deterrence to the commission of that crime. There are a range of possible penalties for such a crime, but as Justice Burger notes in his dissent in *Coker*:

> "We cannot know which among this range of possibilities is correct, but today's holding (finding the death penalty for rape of an adult woman to be unconstitutional) forecloses the very exploration we have said federalism was intended to offer." *Coker* supra at 618.

While Louisiana is the only state that permits the death penalty for the rape of a child less than twelve, it is difficult to believe that it will remain alone in punishing rape by death if the years ahead demonstrate a drastic reduction in the incidence of child rape, an increase in cooperation by rape victims in the

appreh n and prosecution of rapists, and a gre: onfidence in the role of law on the part of the people. This experience will be a consideration for this and other states' legislatures.

Our holding today permits the death penalty without a death actually occurring. In reaching this conclusion, we give great deference to our legislature's determination of the appropriateness of the penalty. This is not to say, however, that the legislature has free reign in proscribing penalties. They must still conform to the mandates of the Eighth Amendment and Article I, § 20 of the Louisiana Constitution, and they are still subject to judicial review by the courts. We hold only that in the case of the rape of a child under the age of twelve, the death penalty is not an excessive punishment nor is it susceptible of being applied arbitrarily and capriciously.

DECREE

For the reasons stated above, we find La. R.S. 14:42(C) to be constitutional. The motion to quash in each case is reversed and vacated. These cases are remanded to the respective trial courts.

SUPREME COURT OF LOUISIANA

DEC 13 1996

No. 96-KA-1392

STATE OF LOUISIANA

v.

ANTHONY WILSON

ON DIRECT CRIMINAL APPEAL FROM THE CRIMINAL DISTRICT COURT FOR THE PARISH OF ORLEANS

consolidated with

No. 96-KA-2076

STATE OF LOUISIANA

v.

PATRICK DEWAYNE BETHLEY

ON DIRECT CRIMINAL APPEAL FROM THE FOURTH JUDICIAL DISTRICT COURT FOR THE PARISH OF OUACHITA

KIMBALL, J., concurring in result.

Because I do not believe *Coker* precludes the imposition of the death penalty in all circumstances of the rape of a child under the age of twelve and Louisiana's statutory scheme sufficiently narrows the class of death-eligible defendants, I respectfully concur in the result.

SUPREME COURT OF LOUISIANA

NO. 96-KA-1392

DEC 13 1996

STATE OF LOUISIANA

versus

ANTHONY WILSON

APPEAL FROM CRIMINAL DISTRICT COURT
PARISH OF ORLEANS

consolidated with

NO. 96-KA-2076

STATE OF LOUISIANA

versus

PATRICK DEWAYNE BETHLEY

APPEAL FROM FOURTH JUDICIAL DISTRICT
PARISH OF OUACHITA

gm

VICTORY, J., concurs with reasons.

I fully agree with the majority's conclusion that LSA-R.S. 14:42(C), which allows for the imposition of the death penalty against an offender who commits aggravated rape of a child under 12 years of age, is not unconstitutional.

I write separately to express my view that the Legislature should immediately amend Articles 905 et. seq. of the Code of Criminal Procedure (especially article 905.2) to clarify the sentencing procedure for an aggravated rape case in which the death sentence may be imposed.

SUPREME COURT OF LO' 'ANA

NO. 96-KA-1392

STATE OF LOUISIANA

Versus

DEC 13 1996

ANTHONY WILSON

APPEAL FROM CRIMINAL DISTRICT COURT
PARISH OF ORLEANS

consolidated with

No. 96-KA-2076

STATE OF LOUISIANA

versus

PATRICK DEWAYNE BETHLEY

APPEAL FROM FOURTH JUDICIAL DISTRICT
PARISH OF OUACHITA

CALOGERO, Chief Justice, dissents.

No other state in the union imposes the death penalty for the aggravated rape of a child under twelve years of age. The reason for this, in my view, is that the statute fails constitutional scrutiny under the decisions of the United States Supreme Court in Coker v. Georgia, 433 U.S. 584 (1977), Furman v. Georgia, 408 U.S. 238 (1972), and Gregg v. Georgia, 428 U.S. 153 (1976). I therefore dissent and would hold R.S. 14:42(C) facially unconstitutional under the Eighth Amendment to the United States Constitution.

Supreme Court of Louisiana

FOR IMMEDIATE NEWS RELEASE

NEWS RELEASE # 132

FROM: CLERK OF SUPREME COURT OF LOUISIANA

On the 30th day of December, 1996, the following action was taken by the Supreme Court of Louisiana in the case(s) listed below:

REHEARING GRANTED:

96-C - 0732 C/W 96-C - 0741 — HELENA BABIN KENNEDY v. JAMES KENNEDY (Parish of Claiborne)
VICTORY, J. - not on panel.

REHEARING NOT CONSIDERED; NOT TIMELY FILED:

96-CA- 0543 — MED EXPRESS AMBULANCE SERVICE, INC. v. EVANGELINE PARISH POLICE JURY, ET AL (Parish of Evangeline)
WATSON, J. - not on panel.
BLEICH, J. - would grant a rehearing.

REHEARINGS DENIED:

95-C - 0112 C/W 95-CA- 0259 — LORRAINE S. WHITNELL, WIFE OF/AND JAMES WHITNELL v. DR. ARTHUR SILVERMAN C/W LORRAINE S. WHITNELL, WIFE OF/AND JAMES WHITNELL v. DR. ARTHUR SILVERMAN, DR. JOHN G. MENVILLE, ET AL (Parish of Orleans)
CALOGERO, C.J. - not on panel.
WATSON, J. - would grant a rehearing.
LEMMON, J. - would grant a rehearing.
YELVERTON, J. - would grant a rehearing.

95-KA- 2307 — STATE OF LOUISIANA v. WILLIAM EARL POWDRILL, III, AND UWE SCHMIDT (Parish of Caddo)
CALOGERO, C.J. - assigns additional concurring reasons.
LEMMON, J. - would grant a rehearing.
KIMBALL, J. - would grant a rehearing.
VICTORY, J. - not on panel.
BLEICH, J. - would grant a rehearing.

96-B - 1379 — IN RE: DAVID L. LEVINGSTON
CALOGERO, C.J. - would grant rehearing in order to consider anew the matter of restitution.
VICTORY, J. - not on panel.

96-KA- 1392 — STATE OF LOUISIANA v. ANTHONY WILSON A/K/A "NIP" (Parish of Orleans)
CALOGERO, C.J. - would grant a rehearing.
WATSON, J. - would grant for reasons assigned by Calogero, C.J., dissenting.
JOHNSON, J. - not on panel.

96-KA- 2076 — STATE OF LOUISIANA v. PATRICK DEWAYNE BETHLEY (Parish of Ouachita)
CALOGERO, C.J. - would grant a rehearing.
WATSON, J. - would grant for reasons assigned by Calogero, C.J., dissenting.
JOHNSON, J. - not on panel.

B

REPORT OF

CAPITAL RAPE PROSECUTIONS IN LOUISIANA

Prepared for the
Supreme Court of Louisiana

By Staff of the
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C

Report of
Capital Rape Prosecutions in Louisiana

In accordance with Rule XXXI(C)(9) and (14), the Louisiana Indigent Defender Board (LIDB) submits the following interim study on the number of cases resulting from the amendment to La. R.S. 14:42 by La. Acts 1995, No. 397, § 1 and this Court's decision in *State v. Bethley*, 96-1392 (La. 12/13/96), 685 So.2d 1063, upholding this provision as constitutional.

The pertinent portions of La. R.S. 14:42, provide:

> A. Aggravated rape is a rape committed upon a person sixty-five or older or where the anal or vaginal sexual intercourse is deemed to be without lawful consent of the victim because it is committed under any one or more of the following circumstances:
>
> * * *
>
> (4) When the victim is under the age of twelve years. Lack of knowledge of the victim's age shall not be a defense.
>
> * * *
>
> C. Whoever commits the crime of aggravated rape shall be punished by life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. However, if the victim was under the age of twelve years, as provided by Paragraph A(4) of this Section, the offender shall be punished by death or life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence, in accordance with the determination of the jury.

This Court, in *Bethley* determined that "in the case of the rape of a child under the age of twelve, the death penalty is not an excessive punishment nor is it susceptible of being applied arbitrarily and capriciously." *Id.* at p. 19.

In order to determine the fiscal impact to the indigent defense system in Louisiana resulting from this legislative act, the LIDB contacted the forty-one judicial district indigent defender boards to compile data on the number of prosecutions. From this data, it will be possible to estimate the financial resources necessary for the defense of these cases. Underlying this study, it should be noted, is the assumption that the defense of a capital crime requires expenditures in excess of the defense of a non-capital crime of equal complexity. Not only is an additional attorney required for the defense team, but added resources and time are needed to properly defend during the bifurcated proceedings.

On February 28, 1997, there were 29 pending capital indictments under La. R.S. 14:42. In addition, five cases were awaiting presentation to a grand jury. Because this study focused only on the district indigent defender boards, no effort was made to determine the number of capital indictments being handled by privately retained counsel beyond verifiable information made available to the defender programs. Of the 29 pending capital indictments, two are proceeding outside the indigent defender system. *See*, Appendix I.

The LIDB is presently attempting to determine the fiscal impact of these cases on the indigent defense system in Louisiana, by isolating the additional costs in each case. By collecting sample data on the cost of defending a statutory rape case prior to the 1995 legislative amendment, it will be possible to compare these findings with data being collected on the cost of defending a statutory rape case charged as a capital crime. These additional findings should be available by the first quarter of 1998.

Capital Rape Cases as of 2-28-91

JDC	PARISH(ES)	Public Defender Cases	Others (If Known)
1st	Caddo	0	
2nd	Claiborne, Bienville, Jackson	0	
3rd	Union, Lincoln	[4]	
4th	Morehouse, Ouachita	1	1
5th	W.Carroll, Richland, Franklin	0	
6th	E. Carroll, Madison, Tensas	0	
7th	Concordia, Catahoula	0	
8th	Winn	0	
9th	Rapides	1	
10th	Natchitoches	0	
11th	Desoto, Sabine	0	
12th	Avoyelles	1	
13th	Evangeline	0	
14th	Calcasieu	2	
15th	Vermilion, Lafayette, Acadia	0	
16th	Iberia, St.Martin, St.Mary	0	
17th	Lafourche	0	
18th	Iberville, W.B.R., Pointe Coupee	0	
19th	E.Baton Rouge	1	
20th	E. Feliciana, W. Feliciana	0	
21st	St.Helena, Tangipahoa, Livingston	Unknown	
22nd	St.Tammany, Washington	3	1
23rd	Assumption, Ascension, St.James	0	
24th	Jefferson	1	
25th	Plaquemines	0	
26th	Bossier, Webster	Unknown	
27th	St. Landry	1	
28th	La Salle	[1]	
29th	St. Charles	1	
30th	Vernon	1	
31st	Jefferson Davis	0	
32nd	Terrebonne	1	
33rd	Allen	Unknown	
34th	St. Bernard	1	
35th	Grant	1	
36th	Beauregard	0	
37th	Caldwell	0	
38th	Cameron	0	
39th	Red River	0	
40th	St. John the Baptist	1	
41st	Orleans	10	
	Totals	**27**	**2**

Note: Numbers in brackets represent cases pending before grand juries and are not included in the totals.

Appendix I

11. PW LB

ORIGINAL

NO. 96-8334

(3)

Supreme Court, U.S.
FILED
APR 23 1997
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

PATRICK DEWAYNE BETHLEY
PETITIONER

VERSUS

STATE OF LOUISIANA
RESPONDENT

STATE'S RESPONSE TO DEFENDANT'S PETITION FOR WRIT OF CERTIORARI

ORIGINAL BRIEF ON BEHALF OF THE STATE OF LOUISIANA

A CAPITAL CASE

RICHARD P. IEYOUB
ATTORNEY GENERAL
STATE OF LOUISIANA

JERRY L. JONES
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FOURTH JUDICIAL DISTRICT
P.O. BOX 1652
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STATEMENT OF JURISDICTION

Jurisdiction in this matter is controlled by 28 U.S.C. 1257. Pursuant to that statute, the finality of the state judgment for review by the United States Supreme Court is normally defined by imposition of sentence. Flynt v. Ohio, 451 U.S. 619, 101 S.Ct. 1958 (U.S. Ohio 1981). The instant case has not proceeded to trial and sentence has not been imposed. The decision of the Supreme Court of Louisiana finding the death penalty constitutional for the crime of rape of a child less than twelve is not within the jurisdiction of this Honorable Court. The defendant has an adequate remedy by way of appeal of any adverse judgment to the appropriate courts.

QUESTION PRESENTED FOR REVIEW

Can the State of Louisiana seek the death penalty for an AIDS inflicted child rapist?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional and statutory provisions. The Eighth Amendment to the Constitution of the United States, which provides in pertinent part:

"Excessive bail shall not be required..nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part:

> "[N]or shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

LSA-R.S. 14:42, which provides in pertinent part:

> "A. Aggravated rape is a rape committed upon a person sixty-five years of age or older or where the anal or vaginal sexual intercourse is deemed to be without lawful consent of the victim because it is committed...
>
> *******
>
> (4) When the victim is under the age of twelve years. Lack of knowledge of the victim's age shall not be a defense
>
> ******
>
> C. ..[I]f the victim was under the age of twelve years, as provided by Paragraph A(4) of this section, the offender shall be punished by death or life imprisonment at hard labor without benefit of parole, probation or suspension of sentence, in accordance with the determination of the jury."

STATEMENT OF THE CASE

The defendant, Patrick DeWayne Bethley, DOB 2/9/68, has been indicted in a three count indictment for aggravated rape of three minor children, all under the age of 12: A.K. DOB 12/5/90; F.K. DOB 3/9/88 and L.K. DOB 11/29/86. The offenses are alleged to have occurred between December 1, 1995 and January 10, 1996. On April 15, 1996, the State announced that it would seek the death penalty in this case pursuant to R.S. 14:42(C) as amended in legislative session .

On April 30, 1996, the defendant filed a "Motion to Strike and Quash as Unconstitutional the Louisiana Statute providing for the Imposition of the Death Penalty in Cases of Aggravated Rape in which the victim is under the age of twelve years."

On May 29, 1996, the motion was heard by the Honorable John R. Harrison, Fourth Judicial District Court and taken under advisement.

On June 7, 1996, the trial court granted the defendant's Motion to Quash, finding the death penalty unconstitutional as it relates to aggravated rape when the victim is under the age of 12. The Court found that R.S. 14:42, as amended, would "pass muster under the Eighth Amendment and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, and Article 1, Section 20 of the Louisiana Constitution" if the class of death-eligible defendants was not limited under LSA-R.S. 14:42 and C.Cr.P. Art. 905 et.seq.

On June, 11, 1996, the State gave notice of its intent to appeal the ruling and was given until July 26, 1996. The State requested an extension and was given until August 5, 1996 to submit its brief. On December 13, 1996, the Louisiana Supreme Court upheld the constitutionality of La. R.S. 14:42(C). The defendant applied for rehearing which was

denied.

The defendant now applies for writ of certiorari with this Honorable Court.

SUMMARY OF THE ARGUMENT

Legislative enactments are presumed constitutional under both the Federal and State Constitution. Gregg v. Georgia, infra; State v. Griffin, 495 So.2d 1306 (La. 1986). The decision by the Supreme Court of Louisiana finding the death penalty constitutional for the crime of rape of a child less than twelve is not within the jurisdiction of this Court. In context of criminal prosecution, the finality of state court judgment for purposes of review by the United States Supreme Court, is normally defined by the imposition of sentence. Flynt v. Ohio, 101 S.Ct. 1958, 451 U.S. 619 (U.S. Ohio 1981). This case has not proceeded to trial and sentence has not been imposed. The defendant has an adequate remedy by way of appeal of any adverse judgment to the appropriate court.

Evolving needs of society mandate the protection of our children especially in a society with sexually transmitted diseases such as AIDS that can lead to death much quicker and with more certainty than any decision by a jury. Accordingly this writ of certiorari should be denied.

ARGUMENT

The case before the Court is that of State of Louisiana v. Patrick Bethley, No. 96-8334 whom the state alleges raped three young girls all under the age of twelve and further it is alleged that at the time the rapes occurred Patrick Bethley knew that he had Aquired

Immune Deficiency Syndrome commonly referred to as AIDS. One of the girls was the natural child of Bethley.

The people of Louisiana have determined through their legislature that the death penalty for the rape of a child under twelve is necessary for the protection of their children and to provide for a stable community. This Court has acknowleged that child abuse can have a devastating effect on a child to the extent that where a defendant in a capital murder case has been the subject of abuse, the jury must be allowed to cnsider that as a mitigating circumstance. Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989).

Applicant asserts that the death penalty for the rape of a child under the age of twelve violates both the Eighth Amendment and the Fourteenth Amendment to the United States Constitution.

I. Eighth Amendment Challenge

The Eighth Amendment prohibits punishment that is cruel and unusual. U.S.C.A. Const. Amendment 8; Furman v. Georgia, 409 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). A punishment is cruel and ubusual if it is administered in an arbitrary and capricious manner or if it is excessive. Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

A punishment is administered in an arbitrary and capricious manner if it is imposed in a discretionary manner. A jury cannot be given "unbridled discretion" but must be guided by law. Gregg, supra.

A punishment is excessive if it makes no measurable contribution to acceptable

goals of punishment and is, therfore, nothing more than unnecessary and wanton infliction of pain or if it is grossly out of proportion to the severity of the crime.

a. Death As A Penalty For The Rape Of A Child Less Than Twelve Years Is Not Excessive

Death is an excessive penalty when it is contrary to "contemporary values." Punishment for a crime must reflect "the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 78 S.Ct. 590 (1958), Thompson v. Oklahoma, 487 U.S. 815, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988). The Eighth Amendment is not a "static concept". Gregg , supra. Society does change and what is considered appropriate measures to protect society change.

This Court has held that the actions of legislatures and juries are to be considered as objective criteria in determing whether a sentence is disproportionate. Gregg, supra; Coker v. Georgia, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977); Penry , supra . However, these cannot be dispositive in all cases. If this were true, then the Eighth Amendment would be a "static concept" in that legislatures could not respond with new and necessary measures to protect society as it changes.

1. Legislative Enactments And Actions of Sentencing Juries

Applicant makes much of the fact that Louisiana is the only state in over twenty years that has authorized the death penalty for the rape of a child under twelve. This fact must be viewed in light of the development of capital punishment since the time of Furman and Coker coupled with the needs of society today.

The state of capital punishment after the Furman decision holding that the death penalty could not imposed in a discretionary manner has been somewhat uncertain. Following right on the heels of Furman the Court in Coker held that the death penalty for rape of an adult woman was unconstitutional. Certainly states have been hestitant to impose the death penalty for any crime other than murder. However, much has changed since the time of Furman and Coker. Today we have AIDS, a sexually transmitted disease that is ultimately deadly. We have to teach children the difference between a "good touch" and a "bad touch" so that they may better protect themselves. Parents don't let their children walk a few blocks to the park for fear that someone will pick them up. The death penalty for the rape of a child under twelve is necessary to cope with these changes in our society and to provide for the protection of our children.

In evaluating the actions of legislatures and juries, this Court has done so in light of the culpability of the offender. Where a defendant participated in a robbery but did not kill, intend to kill, or intend that a killing take place, his culpability was not such that the death penalty was permissible. Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) . Where a defendant is under the age of sixteen, he is not as culpable as an adult due to his youth and inexperience and therefore the death penalty is not permissible. Thompson, supra. On the other hand, when a person is a major actor in a felony and knows that death is likely to occur and a death occurs, the death penalty is appropriate. Tison v. Arizona, 481 U.S. 135, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987). The execution of the mentally retarded was held by this Court to be Constitutional. There are different levels of mental retardation and it is difficult to asses to what degree a person is retarded and how the retardation affects their propensity to commit crimes. Additionally,

in many cases such as was the case in Penry, the mentally retarded will not be able to learn that his behavior is not appropriate increasing the danger to society of repeated criminal activity. Penry, supra.

As this Court has done in Tison, supra; Enmund, supra; Thompson , supra and other cases when evaluating legislative action, the culpability of the offender must be evaluated. The person that rapes a child less than twelve seeks out that child for his own satisfaction. A child less than twelve is pre-pubescent and will not have the characteristics of development that a child just as few years older has. Pubic hair and genitilia development is not appreciable The offender knows he is having sex with a **child**. The damage a child suffers from sexual molestation is **inherent in the crime**. Brown ,supra. There is no question that the child victim will suffer damage of some kind. The rapist in having sexual intercourse with a child intends that these consequences occur. Additionally, the offender knows that the young child is not capable of protecting himself or herself and indeed the child may not realize what is about to happen to them. Applicant asserts that there is no mental element in the crime of rape of a child. While it is true that there is no "specific intent" requirement in the crime, pratically speaking, the child rapist for reasons stated above seeks out and knows he is having sexual intercourse with a child and has no regard as to the affects his actions have on that child and the community as a whole.

The case before the Court in Coker involved a woman that had been raped but there was no "serious" physical to the victim. The Court noted that "rape by definition does not include the death of or even the serious injury to another person." Coker at 2869. The Court addressed the constitutionality of the death penalty in light of the crime and its affect

on the victim. The Court specifically limited it's holding to the rape of an adult woman and left open the question of rape of a child. Certainly, it cannot be said that the rape of a child less than twelve does not result in permanent injury of some kind, physical, psychological or both. Rape of a child less than twelve cannot be compared to rape of an adult. A child has just begun to live and the things thast happens to that child in its early years affects how he or she will function.

> "Common experience tells us that there is a Vast difference in mental and physical maturity of an Adolescent teenager...and a pre-adolescent child...It Is well known that child abuse leaves scars from one Generation to the next...such injury is inherent In the offense." State v. Brown, 660 So.2d. 123 (La. App. 2d Cir. 1995).
>
> "....Aggravated rape inflicts mental and psychological Damage to its victims and undermines the community Sense of security. The physical trauma and indignities Suffered by the young victim of this offense were Of enormous magnitude...."State v. Polkey, 529 So.2d 474 (La. App. 1 Cir. 1988).
>
> "...the child's tender age made her particularly vulnerable and incapable of resisting....considering acutely deleterious consequences of conduct on an eight-year old child." State v. Jackson, 658 So.2d 722 (La. App. 2d Cir. 1995).
>
> "....and because of his history of childhood abuse That same juror could also conclude that penry was Less morally "culpable than defendant's who have no such excuse. But who acted 'deliberately' as that term is commonly understood." Penry , supra.

The statistics available today (see defendant's brief at pages 18-20) reflecting legislative enactments regarding the rape of a child less than twelve do not support that

the death penalty is unacceptable for the crime in every instance. In fact, the statistical data is inconclusive. This Court should note the trend in legislative enactments directed toward protecting children. Laws have been passed requiring sex offenders to register across state lines, the Protection Against Sexual Exploitation Act was passed to protect children from exploitation. Recently, this Court addressed the Kansas Sexual Violent Predator Act in State of Kansas v. Hendricks, No. 95-1649. Children are a class of persons that need protection. State v. Brown supra;Morisette v. United States, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed.2d. 288 (1952).

> "....the defendant promised the victim (a seven year year old girl) candy if she would lower her pants and underwear . After doing as he requested, she stated that The defendant placed her on the bed, removed his clothes and attempted to have sexual intercourse with her. State v. Feet, 481 So.2d 667 (La. App. 1 Cir. 1985).

The statistics available today (see defendant's brief at pages 26 and27) regarding the actions of sentencing juries likewise do not support that the death penalty is unacceptable for the crime of rape of a child. In Coker, the review of actions of sentencing juries was relative to rape of an adult woman and not a child. Most of the statistics referred to by applicant refer to pre-Furman cases with the emphasis on racial issues. Statistics since Furman are of course scarce. Even after Furman Florida, Mississippi and Tennesse had statutes providing for the death penalty for the rape of a child. However, the Florida statutes, F.S. 775.082(1) and F.S. 794.011(2), were deemed unconstitutional by the Florida Supreme Court in that court erroneously determined that Coker applied. Buford v.

State, 403 So 2d 943 The Mississippi statute, M.C.A. Section 99-3-65, was invalidated in that the Mississippi statutory scheme did not provide for the death penalty where there was not a killing. The Mississippi court did not, however, address the issue of whether the death penalty for rape of a child was constitutional. Leatherwood v. State, 548 So.2d 389 (Miss. 1989). The Tennesse statute was invalidated because the death penalty was mandatory. Collins v. State, 550 S.W.2d 643 (Tenn. 1977). Given that three other states attempted in the post-Furman aftermath to impose the death penalty for the rape of a child does support the proposition that Louisiana is not the only state recognizing the need for such a punishment. This Court should consider this in light of the trend seen in laws enacted by legislation for the protection of children. The enactment of these laws through the years reflects society's increasing need to provide for protection of its children.

The actions of legislatures and juries are not dispositive on the question of whether the death as a penalty for the rape of a child under twelve is excessive. Society has an increasing need to protect its children in light of AIDS and other developments since Furman. The Eighth Amendment is not a static concept but must conform to contemporary values. Living in New Orleans, Louisiana is very different than living in a quiet Midwest town. The Louisiana legislature in providing for the death penalty for the crime of rape of a child has conformed to contemporary values by providing for society's need to protect its children.

II. CAPITAL PUNISHMENT MAKES MEASURABLE CONTRIBUTIONS TO ACCEPTABLE GOALS OF PUNISHMENT

A punishment is excessive if it makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering." Coker, supra. Retribution and deterrance are two legitimate social purposes behind punishment.

> "She took her daughter to the bathroom and discovered that the child had been sexually abused, awakened her husband, informed him that the child had been raped and obtained a pistol from the closet." Upshaw v. State, 350 So.2d 1358 (Miss. 1977).
>
> "In part, capital punishment is an expression of society's moral outrage at a particularly offensive conduct...it is essential in an ordered society that asks its citizens to rely on the legal processes rather than self-help to vindicate their wrongs." Gregg, supra.

Our society does not permit self-help. The need for retribution is addressed in our criminal sanctions. Therefore, to have an ordered society and promote a stable community, our legislature must provide for retribution through criminal sanctions. Gregg, supra. Nowhere is the need for retribution as strong as when the victim is a child. The actions of the mother in Upshaw supra are indicative of that need.

This Court has held that the punishment of a crime should be directly related to the personal culpability of the defendant. California v. Brown, 479 U.S. 538, 107 S.Ct. 837, 93 L.Ed.2d 934 (1987). Applicant asserts that the death penalty for the rape of a child is a strict liability crime and therefore the defendant cannot be culpable. Again, as noted above, a person that rapes a child of eleven years or less knows that he is raping a child

due to that child's physical characteristics and mannerisms. The rapist knows that this child cannot protect himself or herself. One that knowingly rapes an innocent and unprotected child and subjects that child to present and futrue physical and psychological trauma is certainly culpable and responsible for his actions.

III. The Founding Fathers Allowed For The Death Penalty For The Rape Of A Child Under Ten Years Of Age And Not Twelve

Punishment for a crime is excessive if at the time the Bill of Rights was adopted the punishment would have bneen considered cruel and unusual punishment. Stanford v. Kentucky, 106 L.Ed.2d 306 (1989).

At the time the Bill of Rights was adopted capital punishment was recognized for the rape of a child ten years old or less. Blackstone's Commentaries on the Law. It is apparent from this that the crime of rape of a child has aslways been seen as a reprehensible act deserving of severe punishment. The fact that the legislature today acknowledges the rape of an eleven year old as well is of no moment. The statute still contemplates an innocent pre-pubescent child in need of protection.

The death penalty for the rape of a child is a deterrence to the commission of the crime. When a person is sentenced to life, no one hears about it. However, when a person is sentenced to death, it hits the news and the message is out that you do not harm children. Applicant asserts that the death penalty for raping a child will retard reporting of the crime by families. The state asserts that a family where a child is a victim of sexual abuse will no more report the crime when the sentence is life in prison than they will where the punishment is death. The reasons for not reporting are there in either case

whether financial, fear or love and affection.

IV. Protections For The Accused On Both The Federal And State Level Provide That The Death Penalty For The Rape Of A Child Less Than Twelve Will Not Be Imposed In An Arbitrary And Capricious Manner

Louisiana legislation and the jurisprudence developed in both federal and state arenas provide protections for the accused against an arbitrary and capricious imposition of the death penalty.

The constitutionality of death as a punishment was first addressed in Furman,supra. Prior to that time, the punishment of death had been addressed only as to whether the manner in which it was inflicted was barbaric and not whether the punishment itself was unconstitutional. The Furman Court found the death penalty in the cases before it to be unconstitutional in that the penalty was determined in an arbitrary and capricious manner as it was applied in a discretionary manner. Reflecting on the reason for the enactment of the Eighth Amendment, the Court cited the oppressive manner in which the death penalty had been used historically by those in power to attempt to keep in check those that opposed them. Extrapolating that reasoning to the cases before it, the Court found the same type of potential for such discrimination. The judge or jury had "unbridled discretion" in deciding life or death. There was no guidance from legislation as to what the society they represent considered to be the most heinous of criminal conduct requiring the death penalty. The Court noted also that the rich or favored had access to the best legal help while the poor or less favored were represented by someone who may have had no experience representing defendants alleged to have committed serious offenses much less

those involving the death penalty.

The holding in Furman, finding the death penalty in the cases before it to be unconstitutional, was based on the discretionary manner in which the penalty was decided. The court did not hold the death penalty in and of itself to be unconstitutional. Furman, supra; Gregg, supra.

In 1976, the Court again addressed capital punishment. In response to the questions raised in Furman, Georgia enacted legislation requiring a bifurcated proceeding in capital cases whereby a separate hearing was held for the jury to hear additional evidence and argument in deciding whether the death penalty should be imposed. The jury was presented with aggravating and mitigating circumstances regarding the defendant and the crime. The Georgia Supreme Court reviewed every sentence to determine whether it was disproportionate to the sentence usually imposed in similar cases. With these protections against arbitrary and capricious imposition of the death penalty, the Court held that the death penalty does not invariably violate the constitution.

> "The concerns expressed in Furman...can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance, concerns best met by a system that provides for a bifurcated proceeding..."

In 1977, the Court in Coker v. Georgia, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977), found the death penalty for the rape of an adult woman to be unconstitutional. The fact that the Court specifically left open the question of the constitutionality of the death penalty for rape of a child supports the fact that there is a vast difference in the effects a rape has on the child victim and society as compared to the rape of an adult victim. Indeed, since 1977, our recognition and knowledge regarding child sexual abuse has

greatly increased. It is now time to address this issue.

Much has changed since the decision in Furman and Gregg. Louisiana law now requires a bifurcated proceeding in capital cases as was approved in the Gregg court. LSA-C.Cr.P. Art. 905 et.seq. The jury is presented both aggravating and mitigating circumstances regarding the defendant and the crime. Juries no longer have "unbridled discretion" in imposing the death penalty. The aggravating and mitigating circumstances and the manner in which the sentencing is to be carried out as provided in Art. 905 et.seq. satisfy constitutionality requirements. The jury must find at least one aggravating factor of those provided by law. LSA-C.Cr.P. Art. 905.3. The defendant may offer any relevant mitigating circumstance.

C.Cr.P. Art. 905 et.seq., providing for a bifurcated proceeding whereby the jury is provided aggravating and mitigating factors to be considered in the penalty phase of trial complies with the requirement in Gregg that the class of death eligible defendants be limited. Article 905 lists twelve aggravating circumstances to be considered in the penalty phase. Of these at least seven of them could apply in a case involving the rape of a child. C.Cr.P. Art. 905.4 is as follows:

> 1. The offender was engaged in the perpetration or attempted perpetration of aggravated rape, forcible rape, aggravated kidnapping, second degree kidnapping, aggravated burglary, aggravated arson, aggravated escape, assault by drive-by shooting, armed robbery, first degree robbery, or simple robbery.
>
> 2. The victim was a fireman or peace officer engaged in his lawful duties.
>
> 3. The offender has been previously convicted of an unrelated murder,

aggravated rape, aggravated burglary, aggravated arson, aggravated escape, armed robbery, or aggravated kidnapping.

4. The offender knowingly created a risk of death or great bodily harm to more than one person.

5. The offender offered or has been offered or has given or received anything of value for the commission of the offense.

6. The offender at the time of the commission of the offense was imprisoned after sentence for the commission of an unrelated forcible felony.

7. The offense was committed in an especially heinous, atrocious or cruel manner.

8. The victim was a witness in a prosecution against the defendant, gave material assistance to the state in any investigation or prosecution of the defendant, or was an eye witness to a crime alleged to have been committed by the defendant or possessed other material evidence against the defendant.

9. The victim was a correctional officer or any employee of the Department of Public Safety and Corrections who, in the normal course of his employment was required to come in close contact with persons incarcerated in a state prison facility, and the victim was engaged in his lawful duties at the time of the offense.

10. The victim was under the age of twelve years or sixty-five years of age or older.

11. The offender was engaged in the distribution, exchange, sale or purchase,

or any attempt thereof, of a controlled dangerous substance listed in Schedule I, II, III, IV, or V of the Uniform Controlled Dangerous Substances Law.

12. The offender was engaged in the activities prohibited by R.S. 14:107.1(C)(1):

> "No person shall commit ritualistic mutilation, dismemberment, or torture of a human as part of a ceremony, rite, initiation, observance, performance, or practice."

Noting aggravating circumstance number 10 would include every defendant found guilty of aggravated rape, the Court should find that this does not per se invalidate the statute. Lowenfield v. Phelps, 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988). The Lowenfield court determined that a death eligible class may be narrowed in two ways. The legislature may broadly define a capital offense and require jury findings through aggravating circumstances whereby the narrowing is accomplished at the punishment phase. Alternatively, the legislature may define the capital offense so that the jury finding at the guilt phase accomplishes the required narrowing. The fact that an aggravating circumstance addressed at the punishment phase is also an element of the crime does not negate the narrowing function. The statute must be clear as to what constitutes the criminal activity. State v. David, 468 So.2d 1126 (La. 1984). In both instances, the jury must consider any relevant mitigating circumstance concerning the defendant and the offense. California, supra.

While some of the above listed circumstances may not be applicable to a case involving the rape of a child, a jury is given sufficient guidance as to what our society considers to be heinous circumstances regarding the commission of a crime. That is

where circumstances anticipate violence (1,4,7), the defendant's actions demonstrate an exaggerated disregard for life (4,5,7, 10, 11, 12), where circumstances anticipate interference with the carrying out of law an order (2,8,9), or where the defendant's criminal record demonstrates his propensity for crime and disregard for the rules of society (3,6). Certainly as the law regarding capital punishment for rape of a child less than twelve years develops through legislatures and jurisprudence there may be circumstances **added** to the list that are applicable to the rape of a child less than twelve. However, as the law is today, there is more than adequate guidance through La. R.S. 14:42 and La. C.Cr.P. Art. 905 et.seq. to allow the jury to limit the class of death eligible defendants.

A defendant has other protections against the arbitrary and capricious application of the death penalty. Appeal is available with mandatory review. The Louisiana Supreme Court must review capital cases for excessiveness. La.C.Cr.P. Art. 905.9. (See infra for discussion.)

Today we have an Indigent Defender Board (IDB) from which counsel can be appointed to represent a defendant. An IDB attorney representing a defendant in a capital case must be "death-certified". La. Supreme Court Rule XXXI; State v. Feltus Taylor, WL 83866, 93-2201 (La. 1996). Counsel for defendant involved in the case must have adequate experience to effectively represent a defendant facing the death penalty. Defendants have access to funds to assist in obtaining necessary resources to develop their defense. La. R.S. 15:150 provides for the establishment of regional death penalty centers whereby grants may be applied for and funds used by the center in the defense, appeals and other functions related to capital cases. These centers provide a means to follow development and application of the death penalty to assure that the protections as

provided by law are adhered to and that the laws continue to reflect the needs of society.

Certainly since Furman there has been case law developed on both federal and state levels to provide for protection at the trial level. The availability of challenges to jury selection as provided in Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) and progeny guard against discrimination based on race, gender, etc.

Guidance for juries provided in Art. 905 et.seq., development of requirements for adequate representation of the accused and protections developed through the courts guard against arbitrary and capricious imposition of the death penalty of the rape of a child less than twelve years.

CONCLUSION

Respondent accordingly requests that Petiitioner's request for writ of certiorari be denied.

Respectfully submitted:

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STATE OF LOUISIANA

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CERTIFICATE

IT IS HEREBY CERTIFIED that a copy of the foregoing brief was mailed, postage prepaid, to Mr. John Holdridge, Attorney for Defendant, 636 Baronne Street, New Orleans, LA 70113.

MONROE, LOUISIANA, on this 23rd day of April, 1997.

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April 23, 1997

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SUPREME COURT, U.S.

Mr. William Suter
Clerk of Court
Supreme Court of United States
301 Loyola Avenue
New Orleans, LA 70112

Re: Patrick Bethley v.
Louisiana
No. 96-8334

Dear Mr. Suter:

Please find attached the original and ten (10) copies of the Respondent's brief for filing in the above referenced case.

Your cooperation is greatly appreciated.

Sincerely,

Jerry L. Jones
District Attorney

JLJ: afj

cc: Mr. John Holdridge
Attorney for Petitioner

SUPREME COURT OF THE UNITED STATES

PATRICK DEWAYNE BETHLEY *v.* LOUISIANA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

No. 96–8334. Decided June 2, 1997

The petition for a writ of certiorari is denied.

Statement by JUSTICE STEVENS, with whom JUSTICE GINSBURG and JUSTICE BREYER join, respecting the denial of the petition for writ of certiorari.

It is well settled that our decision to deny a petition for writ of certiorari does not in any sense constitute a ruling on the merits of the case in which the writ is sought. *United States* v. *Carver*, 260 U. S. 482, 490 (1923). See *Singleton* v. *Commissioner*, 439 U. S. 940, 942 (1978) (opinion of STEVENS, J., respecting the denial of certiorari); *Maryland* v. *Baltimore Radio Show, Inc.*, 338 U. S. 912, 919 (1950) (opinion of Frankfurter, J., respecting the denial of certiorari). That is certainly true of our decision to deny certiorari in this case. It is worth noting the existence of an arguable jurisdictional bar to our review. Our consideration of state-court decisions is confined to "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." 28 U. S. C. §1257(a). Petitioner has been neither convicted of nor sentenced for any crime. As we have indicated, "in the context of a criminal prosecution, finality is normally defined by the imposition of the sentence." *Flynt* v. *Ohio*, 451 U. S. 619, 620 (1981). See *Baltimore Radio*, 338 U. S., at 918 (noting one reason for denial of certiorari is that "judgment of the lower court may not be final").